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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

Paul Loveday and Californians for Smoking and No Smoking Sections, Petitioners

v.

Federal Communications Commission and the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Section 317(a)(1) of the Communications Act of 1934 requires a broadcast licensee, when it broadcasts a paid advertisement, to identify the person who, "directly or indirectly," paid for the advertisement. Section 317(c) of the Act requires a licensee to "exercise reasonable diligence" to obtain the information necessary to make such announcement. The questions presented are:

1. Whether, under Section 317 and the Federal Communication Commission's implementing regulations, a licensee that broadcasts a political advertisement with knowledge that it was paid for indirectly by the tobacco industry may lawfully announce that it was paid for by "Californians for Regulatory Excess," from whom it directly received the payment.

2. Whether, if knowledge of the indirect source of payment does not itself trigger the identification requirement, a licensee with information suggesting the indirect source of

payment also exercises editorial control over the content of the advertisements fulfills its duty of "reasonable diligence" by accepting without further action conclusionary assurances from the direct source that it controls the content of the advertisements.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
OPINIONS BELOW	3
JURISDICTION	4
STATUTES AND REGULATIONS INVOLVED	4
STATEMENT	7
A. BACKGROUND	7
1. Proposition 5	7
2. Proposition 10	10
B. PROCEEDINGS BEFORE THE FCC	18
C. PROCEEDINGS BEFORE THE COURT OF APPEALS	20
REASONS FOR GRANTING THE WRIT	22
1. The Importance of the Questions Presented	22
2. First Question Presented	25
3. Second Question Presented	28
(a) Type of Investigation Required	29
(b) Legislative History	32
(c) Regulatory History	42
CONCLUSION	46

TABLE OF CONTENTS
(Continued)

		Page
APPENDIX		
A.	Court of Appeals Decision	1
B.	FCC Decision	35a
C.	Pages 37-47 of Petitioners' Opening Brief in the Court of Appeals Showing that the Board of Directors of Californians Against Regulatory Excess had no editorial control over No on 10 advertisements	60a
D.	Letters from Yes on 10 to Stations	
	(1) Letter dated September 26, 1980 from Yes on 10 counsel to stations	78a
	(2) Letter dated October 3, 1980 from Yes on 10 counsel to stations	85a
E.	Letters from No on 10 to Stations	
	(1) Letter dated October 2, 1980 from No on 10 Chairman to stations	91a
	(2) Letter dated October 13, 1980 from No on 10 counsel to CBS, Inc.	98a

TABLE OF CONTENTS
(Continued)

		Page
F.	Declaration of Patricia Leddy, former media consultant to the Tobacco Institute, showing that the Tobacco Institute had editorial control over No on 10 advertisements	103a

TABLE OF AUTHORITIES

	Page
CASES AND ADMINISTRATIVE ADJUDICATIONS	
Albuquerque Broadcasting Co., 40 FCC 1 (1946)	35,36, 37,40
Erlandson v. C.I.R., 227 F.2d 70 (9th Cir. 1960)	27
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	24,25
In re KOOL-TV, 26 FCC 2d 22 42 (1970)	
In re Request for Declaratory Ruling of Paul Loveday and Californians for Smoking and No Smoking Sections, 87 FCC 2d 492 (1981)	4,19, 20,26
In re Violation of Section 317 of the Communications Act, KSTP, Inc., 40 FCC 12 (1958)	35-39
Lorillard v. Pons, 434 U.S. 575 (1978)	40
Loveday v. FCC, 707 F.2d 3,20, 1443 (D.C. Cir. 1983)	21,22 31,38
Scafidi v. Western Loan Building Co., 165 P.2d 260 (Cal App. 1946)	42
United States v. WHAS-TV, Inc., 385 F.2d 784 (6th Cir. 1967)	43,44

TABLE OF AUTHORITIES
(Continued)

	Page
VOTER, 46 RR 2d (P&F) 350 (1979)	19-20, 22
STATUTE	
Communications Act of 1934, Section 317, 47 U.S.C. 317	1,4,5, 18,26-29,31-33,35, 37-40
LEGISLATIVE HISTORY	
House Report No. 1800, 86th Cong., 2d Sess., reprinted in (1960) U.S. Code Cong. & Ad. News at 3527	39
Letter dated May 20, 1960 from FCC Chairman Ford to Hon. Oren Harris printed in (1960) U.S. Code Cong. & Ad. News at 3539	41-42
To Regulate Radio Communications, Hearings on H.R. 7357 Before the Committee on the Merchant Marine and Fisheries, House of Representatives, 67th Cong., 1st Sess. on H.R. 5589, January 6,7,14 and 15, 1926	33-34
S. Rep. No. 1857, 86th Cong., 2d Sess., at 6, (1960)	41
67 Cong. Rec. 5514 (March 13, 1926	34

TABLE OF AUTHORITIES
(Continued)

	Page
REGULATIONS AND ADMINISTRATIVE INTERPRETATIONS	
47 CFR 73.1212	5,6,27, 36,41-42,44-45
FCC Rule 3.409 (the "1944 Rule) announced in 9 Federal Register 14734 (December 19, 1944)	35,36, 39,40
In re Applicability of Sponsorship Identification Rules, 40 FCC 141	22
Federal Register, Vol. 40, No. 82, at 18395	43,45
34 FCC 2d 1105	44-45
40 FCC 2,3	22
TREATISE	
Sands, Sutherland Statutory Construction (4th ed. 1973)	34

IN THE SUPREME COURT OF THE UNITED STATES
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v.

Federal Communications Commission and the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Paul Loveday and Californians For Smoking and No Smoking Sections ("Yes on 10") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming an order of the Federal Communications Commission ("FCC").

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, p. 1a)[1] is reported at 707 F.2d 1443 (D.C.

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[1] "App." refers to the Appendix to this Petition.

Cir. 1983). The memorandum opinion by the FCC's Broadcast Bureau dated October 30, 1980 is attached to the FCC's Order (App. B, p. 35a) which is reported at 87 FCC 2d 492 (1981).

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1983. Mr. Justice Brennan extended the time for filing this Petition to September 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUES AND REGULATIONS INVOLVED

Section 317 of the Communications Act of 1934 (the "Act"), 47 U.S.C. 317, provides in pertinent part:

> **(a)(1)** All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished as the case may be, by such person: Provided, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a

broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

. . . .

(c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

. . . .

(e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

The applicable regulation is 47 CFR Section 73.1212, which provides in pertinent part:

(a) When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce (1) that such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) by whom or on whose behalf such consideration was supplied:

. . .

(b) The licensee of each broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any matter for broadcast, information to enable such licensee to make the announcement required by this section.

. . . .

(e) The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unicorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received, or by whom the material services referred to in paragraph (d) of this section are furnished. Where an agent or other person or entity contracts or otherwise makes arrangements with a

station on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent.

STATEMENT

A. BACKGROUND

This case arises from two California ballot proposition campaigns to create smoking and no smoking sections in certain indoor places--Proposition 5 on the November 1978 California ballot and Proposition 10 on the November 1980 California ballot.

1. Proposition 5

The Tobacco Institute, the political arm of the tobacco industry, retained Woodward, McDowell & Larson to manage the No on 5 campaign. (J.A. 16)[2] Cognizant of the fact that widespread public knowledge of the tobacco industry involvement would damage the credibility of the No on 5 campaign, the Tobacco

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[2] "J.A." refers to the Joint Appendix in the Court of Appeals, a copy of which has been lodged with the Clerk of this Court.

Institute and its campaign manager took numerous steps to disguise and deny tobacco industry involvement. (J.A. 21-22, 41A-54) The most important steps were (i) the creation of "Californians for Common Sense," a nonprofit California corporation through which the cigarette manufacturers funneled $6.4 million against Proposition 5, and (ii) the use of the Tagline of "Paid for by Californians for Common Sense" at the close of each broadcast advertisement against Proposition 5.

The attempt to disguise tobacco industry involvement was not wholly successful because of record spending by the industry.[3] Funded by a supply of dollars that no California political campaign has seen before or since, No on 5 commenced its unprecedented media blitz in July of 1978, four months before the election, and continued its statewide advertising efforts every day until the

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[3]The tobacco industry's spending exceeded the combined spending by both candidates for California Governor in the same election. (J.A. 14).

November election. The September 23, 1978 campaign finance disclosure statement (required by the California Fair Political Practices Act) showed that, at a time when most campaigns were just beginning their spending, more than $3 million had already been transferred to Californians for Common Sense and that 99.6% of such money came from the tobacco industry. (J.A. 297-355). This revelation created an understandable sensation and was widely reported.

The spending of so much money so early in the campaign was proven to have been a major tactical mistake. Independent research disclosed by the renowned California pollster Mervin Field after the 1978 election found that public knowledge of the tobacco industry's involvement and spending reduced the credibility of the No on 5 campaign and almost caused the tobacco industry to lose the election. (J.A. 55) Indeed, Mervin Field opined that "if the tobacco industry had spent

a couple more million dollars, it might have lost the election." (Id.)

2. **Proposition 10**

Cognizant that awareness of tobacco industry sponsorship of the No on 5 campaign had almost caused it to lose the 1978 election, the tobacco industry in 1980 implemented a far more sophisticated scheme to conceal its sponsorship of the No on 10 campaign. The Tobacco Institute retained Robert Nelson and Associates, Inc. (consisting of Robert Nelson and Eileen Padberg) to manage the No on 10 campaign. (App. C, pp. 61a-63a and App. F, pp. 103a-110a) Attorneys retained by the cigarette manufacturers incorporated Californians Against Regulatory Excess (hereinafter sometimes "No on 10") on June 12, 1980 . (J.A. 83) Thereafter, Robert Nelson and Eileen Padberg recruited several Californians to sit on the Board of Directors of No on 10. (App. C, pp. 61a-63a)

No on 10 purchased advertising air time from September 30 through election day on 50 television stations and 105 radio stations

(J.A. 89-90), and paid for this time with the $2.7 million contributed by four cigarette manufacturers in proportion to each manufacturer's relative share of the tobacco market:[4]

1980 No on 10 Campaign

Company	Relative 1979 Market Share Among Contributing Companies	% of Cash Contributions Among Contributing Companies
Brown & Williamson Tobacco Company	16.8%	16.8%
Lorillard	11.4%	11.6%
R.J. Reynolds Tobacco	38.1%	37.9%
Philip Morris	33.6%	33.7%

Each No on 10 ad closed with a Tagline of "Paid for by Californians Against Regulatory Excess."

Petitioners in two letters, which are attached hereto as App. D, pp. 78a-90a, notified all California broadcast stations of their obligations under Section 317 and provided the stations with easily verifi-

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[4]The data on which the figures are based are contained in the March 1980 issue of the Tobacco Reporter (J.A. 108-110) and the No on 10 campaign financing disclosure statement as of October 20, 1980 (J.A. 209-220).

able facts which outlined the tobacco industry's scheme to deceive the voters and the motive for such scheme. The letters informed the stations that:

1. During the Proposition 5 campaign 99.4% of the $6.4 million spent against that campaign came from the tobacco industry.

2. Mervin Fields's polling research caused him to conclude that

> . . .with Proposition 5, the fact that the tobacco industry was spending as much as it was to defeat it, became an issue. There was sort of a counter trend in the closing days of the campaign. If the tobacco industry had spent a couple million more dollars, it might have lost the election.

3. In order to prevent tobacco industry spending from becoming an issue in the Proposition 10 campaign, the tobacco industry implemented a calculated policy to deceive as many voters as possible about tobacco industry involvement and spending by:

(a) utilizing a front organization with the name Californians Against Regulatory Excess;

(b) causing its campaign managers to make numerous public and private statements either to the effect that the tobacco industry would not be involved in the Proposition 10 campaign or that it was uncertain whether the tobacco industry would be involved;

(c) causing its campaign managers to represent publicly that Californians Against Regulatory Excess could run a viable campaign without tobacco money;

(d) hiring Woodward, McDowell and Larson to write and produce ads against Proposition 10. The letter noted that the same firm had written and produced the ads against Proposition 5;

(e) utilizing a Tagline in those ads of "Paid for by Californians Against Regulatory Excess";

(f) refraining from spending any money on advertising against Proposition 10 until September 24, 1980, the day after the cut-off date for disclosing campaign expendi-

tures to the California Fair Political Practices Commission ("FPPC"). The letter noted that under California law subsequent contributors and expenditures need not be reported until 10 days before the election; and

(g) transferring very large amounts to Californians Against Regulatory Excess promptly after September 23 and causing Californians Against Regulatory Excess to buy approximately $1 million of air time in the 10 days after September 23. The first letter noted that these air time buys cost far more than No on 10's resources as reported in its September 23 campaign finance disclosure statement. Such statement had shown only a few thousand dollars of cash on hand.

4. The campaign spending disclosure statement as of September 23 reported that 98% of the money transferred to Excess ($378,262 of a total of $389,099) came directly from the tobacco industry.

5. The campaign spending disclosure statement (together with copies of mailings

from the No on 10 campaign in the hands of Yes on 10) reveal that the small sums given to the No on 10 campaign from non-tobacco sources resulted from a mailing financed by the tobacco industry. The mailing requested each recipient to make a contribution of only $3.00 to No on 10. Direct mail fundraising experts have advised Yes on 10 that, given the economics of direct mail, such a mailing would have resulted in a net loss and that the sole purpose of such a mailing could only be for the political purpose of enabling Californians Against Regulatory Excess to claim that it has received numerous small contributions.[5]

The letters urged the stations to exercise reasonable diligence to confirm the

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[5] See J.A. 94 and 101-102 for documentation of these facts. The campaign finance disclosure statements show that No on 10 received $7,837 in direct mail contributions. Since this amount was dwarfed by the moneys spent to raise that sum, it cannot be claimed that any part of that $7,837 was used for the purchase of air time. Thus, 100% of the moneys used to buy No on 10 air time was quite literally paid for by the tobacco industry.

facts set forth therein and asked them to change the Taglines on No on 10 ads.

The scheme outlined in the letters was successful. Whereas there had been prominent and frequent reporting of tobacco industry spending by both the print and broadcast media during the Proposition 5 campaign, the few reports of tobacco industry spending against Proposition 10 were generally buried in the back pages of the newspapers.

The No on 10 campaign responded with letters (App. E, pp. 91a-102a) to the stations which confirmed Petitioners' allegations about the tobacco industry funding of No on 10. A copy of the contribution pages of the No on 10 campaign finance disclosure statement as of September 23 was attached to one of those letters. The No on 10 letters argued that tobacco industry funding was irrelevant since the tobacco industry did not control the campaign:

> The leadership and direction for the Committee vests in its Board of Directors, whose names and titles are set forth on the enclosed brochure.

> This Board meets weekly, makes decisions and supervises the campaign management firm, Robert Nelson and Associates, Inc., which has been retained by the Committee to educate the voters on Proposition 10. (App. E, p. 99a)

Documents and admissions provided by No on 10 counsel to the Federal Communications Commission prove all the above-quoted representations to be false. (App. C, pp. 60a-77a) The No on 10 Board members whom Nelson and Padberg recruited were mere figureheads. One denied being a Board member. (J.A. 160) The Board members did not formulate campaign policy, did not select the campaign manager, and did not select the No on 10 advertising firm. (App. C, pp. 60a-77a) Board members were not consulted regarding campaign decisions, but were merely "updated" about those decisions after they were made and implemented. (App. C, pp. 66a-67a) Most important, Board members did not control or even have input regarding the content of No on 10 advertising (App. C, pp. 69a-71a) A declaration from a media consultant retained by

the Tobacco Institute proves that the Tobacco Institute exercised direct editorial control of No on 10 ads. (App. F, pp. 103a-110a)

Of the 155 stations notified of easily verifiable facts and their duties of due diligence, 144 did absolutely nothing. Eleven stations made minimal pro forma inquiries which consisted of (i) writing one letter or making one or two telephone calls to attorneys or other agents of No on 10 and (ii) then unreasonably relying on false statements by No on 10 representatives that policy was determined by the No on 10 Board of Directors or on false assurances that "no Tobacco Industry money was involved." (J.A. 132-136)

B. PROCEEDINGS BEFORE THE FCC

When the stations refused to act, Petitioners requested on October 16, 1980 a Declaratory Ruling from the FCC that the stations had violated Section 317. The Opposition filed by counsel to No on 10 admitted that "the funding that has been received so far come

(sic) from tobacco companies," but denied "that the source of contributions alone dictates the identification requirement." (J.A. 145) Counsel to No on 10 argued that No on 10's Board of Directors was a "working board" which exercised "direction and control over its own advertising," and denied that the cigarette manufacturers had any control over No on 10 advertising. (Id.)

The FCC's Broadcast Bureau, acting under delegated authority, expressly found that "substantially all or 'virtually 100%' of (No on 10's) funds have come from the four major tobacco companies." (App. B, p. 53a) The Bureau did not consider that this fact by itself was sufficient to trigger the identification requirement of Section 317(a)(1). Instead, without making findings of fact in support of its conclusions and without explaining why it was changing prior policies carefully, consistently and repeatedly articulated for almost 40 years until the FCC's equally deficient decision in VOTER, 46 RR 2d

(P & F) 350 (1979), the Bureau stated that VOTER was "dispositive" and summarily denied Petitioners' request because purportedly

> there has not been any conclusive[6] evidence which establishes that the tobacco companies are exercising editorial control over (No on 10) advertisements. (App. B, p. 53a)

Implicit in the Bureau's decision was that the indirect source of payment need not be identified.

Notwithstanding the total inaction by 144 stations and the minimal pro forma actions by 11 stations, the Bureau stated

> there has been no evidence that the California broadcast station licensees have dismissed this matter without exercising reasonable diligence to ascertain the true sponsor. (Id.)

C. PROCEEDINGS BEFORE THE COURT OF APPEALS

The Court of Appeals affirmed the FCC's decision. The court did not consider whether

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[6] In summarily disposing of Petitioners' appeal after the election, the full Commission deleted the word "conclusive" from the Broadcast Bureau's conclusion. The full Commission's one paragraph order makes it clear, however, that it failed to apply a different standard to the evidence.

the indirect source of payment requires identification. Indeed, the court failed to address Petitioners' contention that a showing of tobacco industry "control" of No on 10 ads was unnecessary because the undisputed fact that 100% of the No on 10 advertising was paid for by the tobacco industry is in itself sufficient to require identification of the tobacco industry as "sponsor". Instead, the court focused solely on whether "the licensees were required to inquire further into the actual sponsorship of the political advertisements." (App. A, p. 3a) The court held that "a licensee confronted with undocumented allegations and an undocumented rebuttal may safely accept the apparent sponsor's representations that he is the real party in interest." (App. A, p. 11a) The court held the Act does not require "the Commission to impose upon licensees a duty to investigate when they receive conflicting representations of the type involved here," (App. A, p. 28a) and that "a licensee need not go behind the information it

receives (from the direct source of payment) to guaranty its accuracy." (App. A, p. 25a, n. 18).

The Court of Appeals also argued that to impose a duty on stations to ask further questions "would be to create an administrative quagmire, to establish standards so variable as to invite abuse, and to raise possible constitutional questions." (App. A, p.29a)

REASONS FOR GRANTING THE WRIT

1. The Importance of the Questions Presented

The question as to whether wealthy special interests may disguise their sponsorship of broadcast political advertisements and prevent the public from knowing "by whom they are being persuaded"[7] is of fundamental importance to the functioning of our democracy and should be resolved by this Court. Leaving

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[7] The FCC has pronounced in numerous statements over a 30 year period that Section 317's purpose is to enable listeners to know by whom they are being persuaded. See 40 FCC at 2, 40 FCC at 141, 26 FCC 2d at 42 and 97 FCC 2d at 496.

undisturbed the Court of Appeals' decision will have a continuing and substantial effect on future political broadcasting and will abrogate the public's right to know the source of political advertising.

Professional opinion polls demonstrate that the source of advertising as identified in Taglines influences voters and is crucial to election results. The Roper Organization's 1978 poll for the Tobacco Institute found that "favorable attitudes toward the Tobacco Institute are at their lowest ebb." (J.A. 62) A 1980 poll by Fairbanks/Canapary/-Maullin determined that 67.2% of Californians would be less likely to vote for a ballot proposition endorsed by the tobacco industry. Only 4.2% would be more likely to vote for a tobacco industry endorsed measure. On the other hand 70.9% would be more likely to vote for or be indifferent to a measure endorsed by Californians Against Regulatory Excess. Only 28.9% would be less likely to vote for a Californians Against Regulatory Excess endorsed

measure. (J.A. 150-151) A poll commissioned by the Tobacco Institute to guide the campaign against Measure A (a 1982 ballot initiative to enact a smoking and no smoking sections ordinance in Bakersfield, California) indicated that public awareness of the tobacco industry's association with the No on A campaign would drive a substantial number of voters into the "yes" column. (App. F, p. 105a)

Moreover, the Court of Appeal's decision destroys one of this Court's important justifications in First National Bank of Boston v. Belotti, 435 U.S. 765 (1978) for overturning state law prohibitations on corporate advertising in political campaigns such as Proposition 10. In Bellotti this court justified its action due to its confidence in the people's ability to evaluate the "relative merits of conflicting arguments" in part because the people would be aware of the "source and credibility of the advocate." 435 U.S. at 791. The court stated that

> Corporate advertising. . . . is likely to be highly visible. Identi-

> fication of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.[8] Id. at 791 n. 31.

Because the cigarette manufacturers recognized the ability of the people to evaluate the merits of conflicting arguments if they are aware of the "source and credibility of the advocate," the cigarette manufacturers caused Californians Against Regulatory Excess to be formed and ads to be placed with deceptive Taglines for the express purpose of hiding the "source and credibility of the advocate."

2. **First Question Presented**

Section 317(a)(1) requires a station to identify the source of advertising payments whether made directly or indirectly. There has never been any question in this case that

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[8] It should be noted that this Court's statement that "identification of the source of advertising may be required" directly contradicts the Court of Appeals' suggestion that Petitioners' position may violate the First Amendment.

indirect payments came from four cigarette manufacturers. Petitioners' easily verifiable statements that virtually all of No on 10's funds came from the tobacco industry was not contested by No on 10 and was tactily admitted in No on 10's letters to the stations. A letter from No on 10's counsel to CBS, Inc. enclosed a copy of No on 10's campaign finance disclosure statement. The FCC specifically found that "it has been shown that substantially all or 'virtually 100%' of (No on 10's) funds have come from the four major tobacco companies, a fact that (No on 10) readily admits in its response." (App. B, p. 53a)

Common sense dictates that four corporations which pay 100% of the cost of political campaign advertising in proportion to their respective shares of the tobacco market control that advertising and are the sponsors of it. This Court, however, need not rely on common sense alone. The plain terms of Section 317(a)(1) requires that "all matter broadcast by any radio station for which any

money. . . is directly or indirectly paid to...the station so broadcasting, from any person, shall. . . be announced as paid for...by such person." (Emphasis added) The FCC Regulations confirm that indirect payment for No on 10 ads by the tobacco companies make them the sponsor of those ads irrespective of any showing of editorial control:

> Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence. . . could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent. 47 CFR 73.1212(e)

47 CFR 73.1212(a)(i) presumes that the party which pays for an advertisement controls advertising policy, as "sponsored" is defined as follows:

> For the purposes of this section the term "sponsored" shall be deemed to have the same meaning as "paid for".

Erlandson v. C.I.R., 227 F.2d 70 (9th Cir. 1960), demonstrates that the tobacco industry "paid for" No on 10 advertising even though the

money flowed through the bank account of Californians Against Regulatory Excess before reaching the broadcast stations. Californians Against Regulatory Excess was but a conduit for the payment of advertising costs by the tobacco industry to broadcast stations. The tobacco industry "paid for" 100% of the advertising and was therefore the "sponsor" of such advertising.

Although this issue was directly raised by Petitioners, the Court of Appeals did not address the issue. The Court of Appeals decision, however, does resolve the issue.

3. **Second Question Presented**

Even if the undisputed fact of 100% funding by the tobacco companies is not sufficient by itself to require identification of the tobacco companies as the sponsor of the No on 10 ads, the legislative and regulatory history of Section 317 make clear that there was sufficient evidence before the stations to require them to do more than passively accept No on 10's false assurances that the tobacco

companies did not control No on 10 ads.

Section 317(c) requires a licensee to "exercise reasonable diligence" to obtain the information necessary to make the appropriate sponsorship announcement. The FCC's interpretation of Section 317(a)(1), which interpretation was incorporated into the Act by Congress' 1960 amendment to Section 317, requires the stations to exercise the "highest degree of diligence" to ascertain and announce the "true identity" of the source of funds and to perform an "arduous" investigation if necessary.

(a) Type of Investigations Required

However, no such arduous investigation would have been necessary during the Proposition 10 campaign. The California stations could have determined that Yes on 10's allegations were true, that No on 10's assurances were false, and that the tobacco industry had editorial control of the No on 10 ads by easily performed investigations that required no more than:

1. requesting copies of minutes of meetings of the Californians Against Regulatory Excess Board of Directors. Had such minutes been requested, the stations would have determined that the No on 10 Board members exercised no "control" whatsoever over No on 10 advertising;

2. asked Californians Against Regulatory Excess for documents, correspondence and records of contacts by it, its campaign manager and its advertising firm with any of the four major cigarette manufactuers and the Tobacco Institute;

3. interviewing any No on 10 Board member or asking No on 10 for a specific example of the exercise of "control" by No on 10 Board members;

4. asking questions or requesting documents regarding the hiring of the No on 10 advertising firm. Had the stations done so, they would have determined the No on 10 Board had no "control" over the advertisements written and produced by Woodward, McDowell &

Larson; and

5. asking No on 10 for explanations of Petitioners specific allegations of dishonesty by No on 10 spokespersons.[9]

The Court of Appeals holding that not even the minimal investigation outlined above is required by the stations until parties such as Yes on 10 prove or "make so strong a circumstantial case that someone other than the named sponsor is the real sponsor" (App. A, p. 34a) means for all practical purposes that Section 317 is effectively repealed. Yes on 10 and similarly situated parties have no access to the books and records of special interests

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[9]All these questions and requests could have been directed to Californians Against Regulatory Excess. Such inquiries would not have constituted what the Court of Appeals terms "a full-scale investigation." (App. A, p. 13a). It should be noted each of the above-stated recommended questions and requests for documents were suggested on page 19 and again on page 60 of Petitioners' Opening Brief in the Court of Appeals. Petitioners are therefore confused by the Court of Appeals' statement that "Petitioners have been rather indefinite about what the California broadcasters were required to do when confronted by (Petitioners') allegations and (No on 10's) counter-allegations." (App. A, p. 29a)

or their campaign organizations and have no power to depose witnesses under oath. Gathering the evidence necessary to meet such a burden of proof in the 30-60 day period between commencement of a special interest political advertising campaign and election day is in all but rare cases a practical impossibility.

(b) **Legislative History**

The Court of Appeals holding that total inactivity by the stations was justified rests on an incorrect analysis of Congressional intent. The legislative history of Section 317 compels, rather than undercuts, an interpretation that required stations in this case to investigate sponsorship.

The history of Section 317 demonstrates the accuracy of the FCC's oft-repeated proclamation that Section 317's purpose is to enable listeners and viewers to know by whom they are being persuaded. Section 317(a)(1) traces its lineage to Section 19 of the Radio Act of 1927. As originally introduced, the relevant section of the bill which

became the Radio Act of 1927 would solely have prevented disguised advertising and would merely have required that advertising material be clearly identified as such.[10] However, the House Committee discarded this language and its narrow purpose and adopted without substantial change language drafted by Mr. Herbert Smith of National Carbon Co. Mr. Smith argued persuasively that his draft (which today is Section 317(a)(1) of the Act down to the proviso) would accomplish that which was really needed--"that is to identify the source (of advertising)." (Radio Act Hearings at p. 82) He argued forcefully that identification of the source of payment for broadcast matter was more important than merely designating advertising as such:

> Do you not think that where propaganda is, as you suggest, insidious,

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[10] To Regulate Radio Communications, Hearings on H.R. 7357 Before the Committee on the Merchant Marine and Fisheries, House of Representatives, 69th Cong., 1st Sess. on H.R. 5589, January 6, 7, 14 and 15, 1926 (hereinafter called "Radio Act Hearings) at p. 5.

> where the source of it is not known at all, that by a catch-all paragraph, such as has been suggested, that by the announcement that the feature is sponsored by, or paid for by, or provided by, and so forth, naming the source, that you immediately destroy its effect as insidious propaganda? (Emphasis added) Radio Act Hearings at p. 85.

The full Congress clearly agreed with Mr. Herbert Smith. An amendment proposed on the floor of the House would have changed the relevant section back to a mere prohibition of disguised advertising. (67 Cong. Rec. at 5574, March 13, 1926) The amendment failed Id., and the Congress passed Mr. Smith's language which was intended to disclose to listeners the source of broadcast advertising.

It is an ancient wisdom that statutes should be interpreted so as to effectuate their manifested purpose or object.[11] Given Congress' purpose to destroy the effect of "insidious propaganda" by requiring identification of the "source" of advertising,

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[11] See Sands, Sutherland Statutory Construction, Section 58.06 (4th ed. 1973) and the ancient and modern cases cited therein.

Congress' purpose is frustrated by a holding that a station, which has been put on notice by a recitation of detailed though undocumented facts that its customer is engaging in a scheme to disguise the source of its advertising, has no duty whatsoever to investigate such source.

This Court need not rely solely on rules of statutory construction, however, since Congress' 1960 amendment of Section 317 explicitly incorporated the then prevailing FCC interpretation of a station's duty to investigate the source. Such interpretation consisted of (i) a FCC rule adopted in 1944 (the "1944 Rule"), (ii) the FCC's 1946 interpretation of the 1944 Rule in Albuquerque Broadcasting Co. 40 FCC 1 (1946), and (iii) a series of opinions (the "NAM Opinions") rendered between 1958 and 1960 in which the FCC held that, with respect to political material supplied to a station, "the highest degree of diligence is called for in ascertaining before presentation thereof, the actual source responsible for furnishing the material. (In re Violation of Section 317

of the Communications Act, KSTP, Inc., 40 FCC 12, 14 (1958)). (Emphasis added).

Section (c) of the 1944 Rule (which, as amended, is currently 47 CFR 73.1212(e)) required that a Tagline disclose the "true identity" of the party by whom the public is being persuaded and declared that merely identifying the agent of the real party in interest is insufficient.

In Albuquerque Broadcasting the FCC interpreted "the nature of the burden of investigation" imposed by Section 317 and the 1944 Rule. The FCC made it clear that the sending of one letter or the making of one or two telephone calls to the purported sponsor did not fulfill a station's duty of investigation for "it is incumbant upon it to take all reasonable measures in this connection." 40 FCC 1. The FCC left no doubt that a station's mere reliance on conclusionary letters from the purported sponsor was insufficient diligence, for it stated that "an independent investigation is necessary" in particular cases. Id.

The FCC noted that "a broadcast station may experience some problems in fulfilling its responsibility under Section 317," and noted that this duty to discover the true identity of the real party in interest sometimes "places an arduous task on management." Id. Moreover, Albuquerque Broadcasting makes clear that an investigation was necessary in the instant case because the California stations were on notice that (i) Californians Against Regulatory Excess represented itself as a poor grass roots organization unable to buy air time and (ii) campaign disclosure statements showed Californians Against Regulatory Excess with only modest cash on hand at the time it was arranging a huge media buy. Albuquerque Broadcasting states:

> If a speaker desires to purchase time at a cost apparently disproportionate to his personal ability to pay, a licensee should make an investigation of the source of funds to be used for payment. 40 FCC 1.

The NAM Opinions, 40 FCC 12-65, involved stations airing political material prepared by station WTTG, but paid for by the

National Association of Manufacturers (the "NAM"). At the direction of the NAM, WTTG distributed the political material to numerous stations which aired the material without identifying the NAM as the source. When investigated by the FCC, the stations protested that the script accompanying the films stated merely that they were produced by WTTG, that it was reasonable to have believed that WTTG was the source of the materials, and that the stations had no actual knowledge that the NAM was the real sponsor. The FCC held in each of the enforcement proceedings that the stations had violated Section 317,[12] that such

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[12] The Court of Appeals' attempt to distinguish the NAM Opinions is flawed. The court writes that "the Commission's pronouncement was made in the context of licensee failure to make any announcement at all and thus does not indicate the extent of licensee responsibility to reject an identification provided by the party who supplied the material". (App. A, p. 24, n. 17) The FCC's focus in the NAM cases was not on the failure to provide Taglines. The FCC focused on the stations' failure to investigate, ascertain and announce the real party in interest notwithstanding the submission by WTTG of facially plausible information to support a conclusion that WTTG was the sponsor. It is clear that the FCC's holdings would not have been altered had the violators announced that WTTG was the sponsor of the material.

uncritical reliance on the statement of WTTG did not even fulfill a station's duty of "reasonable diligence to ascertain the true sponsor and source of (nonpolitical) material," and that with respect to material constituting political or controversial issues, the "highest degree of diligence" is required to ascertain the actual source. 40 FCC 14.

In 1960 Congress added several provisions to Section 317. The sponsorship identification provisions of the Radio Act of 1927 were re-enacted without change as Section 317(a)(1). Congress did, however, overrule a FCC interpretation with which Congress disagreed by adding a proviso to Section 317(a)(1). Since the above-referenced proviso standing alone may have raised doubts about the continued validity of the 1944 Rule, Congress also adopted Section 317(a)(2) for the express purpose of providing "specific statutory authority" for the substance of the 1944 Rule.[13] This Court has held that "Congress is

[13] House Report No. 1800, 86th Cong., 2d Sess., reprinted in (1960) U.S. Code Cong. & Ad. News at 3532.

presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 US 575, 580 (1978). The presumption that Congress was aware of and adopted the FCC's interpretations set forth in Albuquerque Broadcasting and the NAM Opinions is immeasurably strengthened where, as here, Congress exhibited a detailed knowledge of the FCC interpretations and a willingness to overturn interpretations with which it disagreed. It is unlikely that Congress would have explicitly ratified the 1944 Rule without awareness of the two interpretations of that Rule, particularly since the NAM Opinions coincided with the period during which Congress conducted the investigations which preceeded the 1960 amendments to Section 317.

Congress' 1960 adoption of Section 317(c), which requires stations to use reasonable diligence to obtain information to enable it to identify advertising sponsors,

makes even more clear the erroneous nature of the Court of Appeals' holding that stations' total inactivity was justified. The Senate Report describes the reasonable diligence requirement as follows:

> The term "reasonable diligence" would require the licensee to take appropriate steps to secure such information, but it would not place a licensee in the position of being an insurer, nor does this condition permit a licensee to escape responsibility for sponsorship announcements by inactivity on his part. S. Rep. No. 1857, 86th Cong., 2d Sess. at 6 (1960).

Had the California stations taken proper steps to secure information about the source of No on 10 ads and nevertheless come to the wrong conclusion, Petitioners could not have criticized the stations. They are not insurers. In the instant case, however, 144 stations sought to escape responsibility by total inaction on their part.

The Court of Appeals also ignored FCC Chairman Ford's letter to the Congressional author of the 1960 amendment to Section 317 in response to the Congressman's question as to whether the amendment should

contain a definition of "reasonable diligence". Chairman Ford responded that no definition was needed since:

> We believe that the term "reasonable diligence" has a sufficiently accepted legal meaning so as to permit the Commission to apply this standard in given factual situations. (1960) U.S. Code Cong. & Ad. News at 3539

Chairman Ford undoubtedly had in mind cases such as Scafidi v. Western Loan and Building Co., 165 P.2d 260, 271 (Cal. App. 1946) wherein "reasonable diligence" in making inquiry is defined as the exercise of that degree of diligence "such as men of business usually exercise when their interest depends upon obtaining correct information." Had California stations decided that their own business interests depended upon correctly ascertaining the real party in interest with respect to the No on 10 ads, their investigations would have been substantially different.

(c) Regulatory History

The Court of Appeals did not consider the purpose of the affirmation of

a licensee's duty to investigate provided by the FCC's 1975 amendment of 47 CFR 73.1212(e)[14]

The 1975 amendment was made "because of the WHAS decision". Federal Register, Vol. 40, No. 82, at 18395. In United States v. WHAS-TV, Inc., 385 F.2d 784 (6th Cir. 1967), the FCC had held that station WHAS had violated Section 317 by allowing a political program which was really sponsored by the Breathitt gubernatorial campaign organization to carry a Tagline of "Paid for by the Committee for Good Government" (the "Committee"). The Committee was a legally formed entity separate from the Breatthitt

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[14]The FCC's 1975 amendment added the following underlined language to the last sentence of 47 CFR 73.1212(e):

> Where an agent or another person contracts or otherwise makes arrangements with a station on behalf of another and such fact is known or by the exercise of reasonable diligence . . . could be known by the station, the announcement shall disclose the identity of the person or entity on whose behalf such agent is acting instead of the name of such agent.

campaign organization, but created and funded by the Breatthitt campaign. Like the tobacco industry and Californians Against Regulatory Excess, the Breathitt campaign transferred money to the Committee, and the Committee paid WHAS for the air time. The Sixth Circuit reversed the FCC because it believed the then FCC Regulations did not clearly require an investigation of the sponsor. The Sixth Circuit stated, however, that "we are by no means precluding the FCC from adopting a Regulation calculated to require a station to make reasonable efforts to go beyond a named 'sponsor' for a political program in order to ascertain the real party in interest for purposes of announcement." 385 F.2d at 788.

Upon adopting the 1975 amendment the FCC explained that its purpose was

> to clear up any misunderstanding about whether the statute and rules require a licensee, who knows, or has reason to know the facts, to adequately identify the person or persons paying for. . .the material broadcast. . . Where a political

> broadcast is presented. . .by a committee which is really a campaign instrumentality for a candidate or a political organization, the public must be made aware of the latter fact. 34 FCC 2d at 1105.

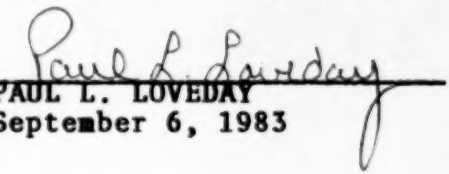
The duty of California stations to investigate the sponsor of No on 10 ads under 47 CFR 73.1212(e) is underscored by the FCC's rejection of National Broadcasting Corporation's ("NBC") 1975 argument that the amendment then under consideration would place an impossible investigative burden on licensees. In reply to NBC's rhetorical question as to how far a licensee must penetrate the political fund-raising process to ferret out the person or group who the FCC will deem to be the "principal" of the "agent", the FCC agreed that the amendment would indeed place some burdensome investigative duties on stations, but:

> Broadcasters are licensed to act as trustees for a valuable public resource and, in view of the public's paramount right to be informed, some administrative burdens must be imposed on the licensee in this area. These burdens simply run with the territory. Federal Register, Vol. 40, No. 82 at 18398.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



PAUL L. LOVEDAY
September 6, 1983

APPENDIX A

COURT OF APPEALS DECISION

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2061

PAUL LOVEDAY and CALIFORNIANS FOR SMOKING AND NO SMOKING SECTIONS, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of an Order of the Federal Communications Commission

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Argued May 19, 1982

Decided May 10, 1983

Paul Loveday (*pro se*) for petitioners.

Cal P. Saunders, Attorney, Federal Communications Commission, with whom *Stephen A. Sharp*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, Federal Communications Commission, *David Silberman*, Attorney, Federal Communications Commission,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Robert B. Nicholson and *Neil R. Ellis*, Attorneys, Department of Justice, were on the brief, for respondents. *Mark C. Del Bianco*, Attorney, Department of Justice, also entered an appearance for respondents.

Before: MACKINNON, GINSBURG and BORK, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* BORK.

BORK, *Circuit Judge*: The Communications Act of 1934, 47 U.S.C. § 317 (1976 & Supp. V 1981), and the regulations of the Federal Communications Commission, 47 C.F.R. § 73.1212 (1981), require licensed broadcast stations to identify the sponsors of paid political advertisements at the time those advertisements are broadcast. The licensee is under a duty, moreover, to make a reasonably diligent inquiry to learn, in order to identify, the true sponsor of the advertisements when the licensee has reason to think that it is someone other than the apparent sponsor. 47 U.S.C. § 317(c) (1976). This case concerns the scope of the licensees' duty to investigate.

Petitioners challenge the Commission's conclusion that California radio and television stations adequately discharged their obligation to investigate and to identify the true sponsor of political advertisements opposing an initiative before the voters of California on a 1980 referendum. Had the electorate approved that initiative, Proposition 10, the resulting law would have required separate smoking and no smoking areas in most enclosed public places, places of employment, and educational or health facilities. California voters rejected the proposition.

The advertisements in question were paid for by a political action committee called Californians Against Regulatory Excess ("Regulatory Excess" or "CARE"). Stations broadcasting the advertisements identified that committee as the sponsor. Petitioners, Paul Loveday

and a political action committee that supported the initiative, Californians for Smoking and No Smoking Sections (or "Yes on 10"), claim that they furnished the stations with sufficient information to require them either to identify the tobacco industry as the true sponsor or, at a minimum, to investigate more diligently. This court has jurisdiction to review the Commission's contrary decision under 47 U.S.C. § 402(a) (1976) and 28 U.S.C. §§ 2342, 2344 (1976).

We affirm because we conclude that, on these facts, the licensees were not required to inquire further into the actual sponsorship of the political advertisements. Indeed, we have substantial doubt that the Commission could require licensees to do more.

I.

A.

On September 26, 1980, Richard Kalish, a representative of Yes on 10 and an associate of petitioner Loveday, wrote to all California radio and television stations asserting that the tobacco industry was sponsoring Regulatory Excess' advertising campaign and was supplying Regulatory Excess with almost all of its funds. He pointed out that Regulatory Excess had, according to its recent campaign finance disclosure statement, been purchasing more radio and television time than its stated resources would permit. He also stated that the tobacco industry had provided almost all of the $6.5 million expended to defeat a similar proposition in 1978. These considerations, Kalish wrote, made it "apparent" that the tobacco industry was virtually the sole source of funds for Regulatory Excess' efforts. The letter directed the licensees' attention to Commission sponsorship identification provisions, which, according to Kalish, required the California licensees "both to discover and to disclose the fact of the Tobacco Industry's sponsorship of the advertising so the public can know 'by whom

it is being persuaded.'" Kalish argued that there was "affirmative deception" involved in identifying Regulatory Excess as a California entity when it received virtually all its funds from sources outside California. Kalish expressed the hope that the licensees would satisfy their sponsorship identification obligations without further prodding, but he also threatened to file a complaint with the Federal Communications Commission or to take other action should the stations fail to satisfy their sponsorship identification obligations. The letter did not document Kalish's allegations.

Receiving no response from any of the California stations, Kalish wrote to them again on October 3. His three-page letter reiterated and amplified both his claim that Regulatory Excess was an agent for the tobacco industry and his analysis of the sponsorship identification requirements.[1] These additional allegations were

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[1] The new allegations Kalish offered were: (1) a pollster had concluded that, since tobacco industry spending for ads had become an issue in 1978 and had caused a backlash, the tobacco industry might have lost the Proposition 5 campaign if it had spent more money; (2) the tobacco industry had hired an advertising firm for Regulatory Excess; (3) the tobacco industry as part of its campaign had caused to be propagated "numerous public and private statements" to the effect that tobacco industry funding was not necessary for Regulatory Excess' operations and was probably not present; (4) the tobacco industry waited until the state campaign finance reporting deadline, September 23, had passed before financing any advertising for Regulatory Excess; (5) 98% of the $389,099 received by Regulatory Excess and reported in that September 23 statement came from the tobacco industry; (6) the small sum Regulatory Excess received from non-industry sources resulting from its mail solicitation, which was financed by the tobacco industry, was, according to direct-mail fundraising experts, outweighed by the cost of the mailing; (7) Regulatory Excess had purchased approximately $1 million of broadcast time since September 23; and (8) all but $3,000 of the money provided to Regulatory Excess by tobacco companies had come from non-California sources.

also undocumented. Kalish asked the stations to identify Regulatory Excess' advertisements as "Paid for by the Tobacco Industry" and warned that Yes on 10 would bring legal action against any stations that did not comply by October 8.

Regulatory Excess responded to Kalish's first letter by sending each licensee a letter from its chairman, David Bergland, outlining the committee's purpose, structure, and campaign efforts to date, as well as a legal memorandum concerning the sponsorship identification rules. In addition, some stations specifically requested an answer to Kalish's allegations from Regulatory Excess. Vigo Nielsen, counsel for Regulatory Excess, replied to at least some of these requests. Nielsen indicated that Regulatory Excess was not an agent for the tobacco industry. He declined to comment upon the tobacco industry's political motives or policies but acknowledged that various tobacco companies, after concluding that a "hands-off" approach might be interpreted as support for Proposition 10, had contributed to Regulatory Excess' campaign. Nielsen also noted that Regulatory Excess was just beginning the process of soliciting contributions from California voters. He dismissed Kalish's threatened legal actions as "diversionary tactics." Finally, he referred to the previously-provided memorandum giving his interpretation of the sponsorship identification requirements, and he appended a copy of the contribution section of Regulatory Excess' state campaign finance report.

According to petitioners, 58 of the 155 California stations that had broadcast commercials for Regulatory Excess replied to Kalish's letters, though only 11 of these stations addressed the sponsorship identification question. No licensee, apparently, stopped identifying the advertisements as paid for by Californians Against Regulatory Excess.

B.

On October 16, 1980, Loveday and Yes on 10 requested a declaratory ruling from the Federal Communications Commission. They alleged that the tobacco industry was the principal behind Regulatory Excess' campaign against Proposition 10 and claimed that the California licensees had failed to satisfy their sponsorship identification obligations. They asked the Commission to declare that the tagline "Paid for by Californians Against Regulatory Excess" violated these obligations and must be replaced by the words, "Paid for by the Tobacco Industry." Because the California vote was to occur only several weeks later, petitioners asked the Commission to give their petition expedited consideration.

Petitioners presented to the Commission, as they have presented to this court, an extensive recital of the factual basis for their charges. They also submitted a wide variety of exhibits, ranging from newspaper and trade journal articles to affidavits signed by Loveday. These submissions were designed to prove that the tobacco industry was the real sponsor of Regulatory Excess' advertisements. Whether that is true, however, is beside the point. The issue before the Commission was whether the licensees were put to a duty to identify the tobacco industry as the sponsor or to inquire further about possible parties behind Regulatory Excess. Petitioners' elaborate case before the Commission was not presented to the licensees. Any duty they may have had could arise only from Kalish's two letters and Regulatory Excess' reply.

The Commission asked Regulatory Excess for a response, and that committee replied to petitioners' application, in accordance with the Commission's request for expedition, on October 24, two days after receiving it. Regulatory Excess described its efforts to reply to the inquiries it had received from the California broadcasters regarding its relationship with the tobacco companies.

We need not detail that response, much of which went to the issue of the tobacco industry's control of Regulatory Excess, for the same reason that we do not set out petitioners' evidence.

C.

The Broadcast Bureau, acting under authority delegated by the Commission, 47 C.F.R. §§ 0.71, 0.281 (1980), denied petitioners' application on October 30. Letter from the Broadcast Bureau to Paul Loveday, JA at 2, *reported at In re Request for Declaratory Ruling of Paul Loveday and Californians for Smoking and No Smoking Sections*, 87 F.C.C.2d 492, 493 (1981). Identifying the issue as "whether the California broadcast station licensees have failed to exercise reasonable diligence to identify the sponsor of the CARE advertisements," *id.* at 496, the Bureau concluded that the stations had met their obligations. The Bureau further observed that the sponsorship identification requirements obligated a licensee to make a reasonably diligent effort to identify the sponsor of broadcast material but did not make a broadcaster an insurer of a sponsor's representations. *Id.* at 496-97. Relying upon an earlier decision, *VOTER*, 46 Rad. Reg. 2d (P & F) 350 (1979), a case similar to this one, the Bureau held that the California stations had acted reasonably. 87 F.C.C.2d at 497. The Bureau added, however, that a decision to attribute Regulatory Excess' commercials to the tobacco industry would have been equally reasonable. *Id.* Turning to the question of editorial control, the Bureau concluded that, despite petitioners' allegation, admitted by Regulatory Excess, that the tobacco companies had provided Regulatory Excess with virtually 100% of its funds, there was no "conclusive evidence" that the tobacco industry exercised editorial control over Regulatory Excess' advertising campaign. *Id.* Finally, the Bureau concluded that there was no evidence that the California licensees had dismissed this matter without exercising reasonable diligence to

learn whether the tobacco companies were exercising editorial control over Regulatory Excess. *Id.* at 497-98.

D.

Upon petitioners' application for review, the Commission affirmed the Bureau's decision. 87 F.C.C.2d at 492 (Order). The Commission noted that the Bureau's decision "was based primarily on a finding that the licensees did not act unreasonably," and it agreed with the Bureau that the information submitted by the parties did not demonstrate that the tobacco companies exercised editorial control over Regulatory Excess' advertisements. *Id.* The Commission modified the Bureau's ruling in only one respect; it struck the word "conclusive" from the Bureau's ruling in order to avoid the implication that the FCC would require a complainant conclusively to establish editorial control in cases like this. *Id.* The Commission accepted the Bureau's decision in all other respects and denied petitioners' application for review.

This petition followed.

II.

Though petitioners suggest a number of standards of review, the law on this subject is clear. The Broadcast Bureau and the Commission rendered their decisions under the authority given by 5 U.S.C. § 554(e) (1976) and 47 C.F.R. § 1.2 (1981) to "issue a declaratory ruling to terminate a controversy or remove uncertainty." The ruling challenged here was issued in a specific factual context and resolved only the issues presented by petitioners' application. This declaratory ruling therefore "belongs to the genre of adjudicatory rulings." *Chisholm* v. *FCC*, 538 F.2d 349, 364 n.30 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976). *See FCC* v. *Pacifica Foundation*, 438 U.S. 726, 734 (1978). Petitioners have made no attempt to distinguish *Chisholm*. As a consequence, in reviewing the FCC decision, this court must ask, as we did

in *Chisholm*, whether the Commission's action was arbitrary, capricious, an abuse of discretion, or contrary to law.[2]

III.

Both the Communications Act and the Commission's regulations require that a broadcast licensee identify the sponsor of any paid matter transmitted and that the licensee "exercise reasonable diligence" to learn who the sponsor is.[3] This standard, according to petitioners, "re-

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[2] In *Chisholm*, the FCC had issued a declaratory ruling, reversing a long-standing interpretation, that press conferences and debates between federal candidates were exempt from the equal time requirements of 47 U.S.C. § 315 (1976) in certain circumstances. We upheld that action by a 2-1 vote. The majority applied the "arbitrary and capricious" standard, 538 F.2d at 364, and the dissent did not take issue with the majority on this point. *Id.* at 366-96 (Wright, J., dissenting).

[3] Section 317 of the Communications Act, 47 U.S.C. § 317, provides in pertinent part:

> (a) (1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.
>
> (2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge

quires the exertion of every effort" by licensees to identify the real sponsors of paid material that is broadcast. Peti-

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or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

. . . .

(c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

. . . .

(e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

The applicable regulation is 47 C.F.R. § 73.1212 (1980), which provides in pertinent part:

(a) When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce (1) that such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) by whom or on whose behalf such consideration was supplied: . . . .

(b) The licensee of each broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any matter for broadcast, information to enable such licensee to make the announcement required by this section.

. . . .

(e) The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished. Where an agent or other person or entity contracts or otherwise

tioners' Opening Brief at 24c. The Commission interprets the statute and its own regulations to impose a much less stringent obligation: a licensee confronted with undocumented allegations and an undocumented rebuttal may safely accept the apparent sponsor's representations that he is the real party in interest.

We agree with the Commission's interpretation of its statutory authorization and of its own regulations. We agree not merely because the Commission's interpretation is entitled to deference but also because we have grave doubts that the Commission could, in circumstances like these, require more of the licensees than it did in this case. A duty to undertake an arduous investigation ought not casually be assigned to broadcasters. A variety of considerations, ranging from practical ones of adminis-

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makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable dfligence, as specified in paragraph (b) of this section. could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent. Where the material broadcast is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall, in addition to making the announcement required by this section, require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity shall be made available for public inspection at the location specified by the licensee under § 73.3526 of this chapter. If the broadcast is originated by a network, the list may, instead, be retained at the headquarters office of the network or at the location where the originating station maintains its public inspection file under § 73.3526 of this chapter. Such lists shall be kept and made available for a period of two years.

. . . .

-11a-

trative feasibility to legal ones involving constitutional difficulties, support that view. We would be reluctant, therefore, to find a power in the Commission to require more of licensees than it has required here unless there existed rather clear evidence that Congress intended to vest such a power. But an examination of the Communications Act, its legislative history, and the evils that Congress addressed does not reveal an intention to require more of licensees than the Commission required here.

A.

The Commission's authority in this area is conferred by section 317 of the Communications Act, 47 U.S.C. § 317 (1976 & Supp. V 1981).[4] Section 317 contains three subsections of particular relevance.

Subsection (a)(1) provides that if a licensee broadcasts any "matter" for which "any money, service or other valuable consideration" has been "directly or indirectly" given or promised to the licensee by "any person," the licensee must announce that its broadcast has been "paid for or furnished, as the case may be, by such person" at the time the broadcast is presented.

A proviso to subsection (a)(1) states that the announcement need not be made for services or property donated without charge or at a nominal charge. The proviso's exemption is narrowed by subsection (a)(2) which states that nothing in the section shall preclude the Commission from requiring "an appropriate announcement" when a licensee broadcasts any political program or program discussing a controversial issue for which the licensee has received any type of broadcast material, even if no monetary consideration is involved.

Subsection (c) requires a station to "exercise reasonable diligence to obtain from its employees, and from

[4] See note 8 *supra*.

other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable [it] to make the announcement required by this section." In contrast to subsection (a)(1), subsection (c) refers only to persons with whom a station deals directly and thus indicates that the station may rely on the data provided by such a person to determine whether the party paying is the real party in interest. In its terms, then, the "reasonable diligence" required by subsection (c) does not mandate a full-scale investigation by a broadcaster and is satisfied by appropriate inquiries made by the station to the party that pays it for the broadcast.

B.

Legislative history tends to confirm the understanding of the licensee's duty indicated by the statute's text. Section 317 traces its lineage to section 19 of the Radio Act of 1927, ch. 169, 44 Stat. 1162, 1170.

1. The Radio Act of 1927, the first comprehensive federal regulation of broadcasting, was primarily a "traffic control" measure authorizing the newly created Federal Radio Commission to eliminate the chaos created by the rapidly increasing number of private broadcasters who often used the same wavelengths in the same vicinities. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 210-13 (1943); *see Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 375-77 & nn.4-5 (1969). The sponsorship identification provision of the Act occupied a humble position in the regulatory design and went virtually unnoticed.

As originally proposed, the predecessor to the 1927 bill, H.R. 7357, did not contain such a provision. *To Regulate Radio Communication: Hearings on H.R. 7357 Before the House Comm. on the Merchant Marine and Fisheries*, 68th Cong., 1st Sess. 1-7 (1924) (reprinting bill (hereinafter *House Hearings on H.R. 7357*). During the hearings, however, Representative Ewin Davis recommended

a provision requiring broadcasters to identify paid advertisements as such. He suggested that the requirement should be similar to an existing postal law that required all mailed, second-class material such as newspapers or magazines clearly to identify all paid advertisements.[5] *House Hearings on H.R. 7357* at 60. Insofar as this suggestion was subsequently addressed in the hearing, the attention devoted to it was cursory. *See, e.g., id.* at 84-85. Section 6 of the bill reported out of the committee required, in the words of the House Merchant Marine and Fisheries Committee, that "all matters broadcasted for which any money or other valuable consideration is paid shall be announced as advertising at the time the same is broadcasted." H.R. Rep. No. 719, 68th Cong., 1st Sess. 6 (1924). The House of Representatives never voted on the bill. H. Warner, *Radio and Television Law* § 92, at 769 & n.38 (1948).

During the next Congress, Representative Wallace White introduced H.R. 5589, which, in section 5, contained a sponsorship identification provision based on section 6 of H.R. 7357. *To Regulate Radio Communication: Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine and Fisheries*, 69th Cong., 1st Sess. 5 (1926) (reprinting H.R. 5589) (hereinafter *House Hearings on H.R. 5589*).[6] Like its predecessor, section 5 of

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[5] Act of Aug. 24, 1912, ch. 389, 37 Stat. 539, 553, *amended*, Act of Mar. 3, 1933, ch. 207, 47 Stat. 1486 (codified at 39 U.S.C. § 234 (1952)), *readopted as amended*, Act of Sept. 2, 1960, Pub. L. No. 86-682, 74 Stat. 578, 671 (codified at 39 U.S.C. § 4367 (1970)), *repealed*, Postal Reorganization Act of 1970, Pub. L. No. 91-375, § 2, 84 Stat. 719.

[6] Section 5 provided:

> All matters broadcasted by any radio station for which service[,] money or any other valuable consideration is directly or indirectly paid or promised to or charged or accepted by, the station so broadcasting, shall be announced as "advertising" at the time the same is so broadcasted: *Provided*, That when the advertisement or publicity sought consists solely of the announcement of the

H.R. 5589 was the subject of limited discussion.[7] The Committee Report accompanying H.R. 5589 referred to section 5 only briefly and stated simply that the purpose of this provision was "to make sure that advertising shall not be hidden from the listener." H.R. Rep. No. 404, 69th Cong., 1st Sess. 3 (1926).

On the House floor, another bill, H.R. 9971, which also contained a sponsorship identification provision, was substituted for H.R. 5589. 67 Cong. Rec. 5473-78 (1926). The House engaged in a lengthy debate over H.R. 9971, but section 5 was rarely addressed. There was no discussion of the proposed sponsorship identification section, and the only amendment offered to this provision, one which would have eliminated the committee's proposal to permit alternative forms of announcements, was defeated. *Compare* 67 Cong. Rec. 5488 (1926) (proposed amendment by Rep. Cellar) *with id.* at 5574 (vote on amendment). The House passed H.R. 9971 with section 5 unchanged.

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name, business, and address of the person, firm, company, or corporation paying for the feature broadcasted it shall be sufficient to announce that such feature is "paid for or furnished by" such person, firm, company, or corporation.

[7] Again, only two witnesses addressed section 5 in their testimony. One, Commerce Department Solicitor Stephen Davis, stated that the Department, the executive department then responsible for regulating radio, was "complete[ly] indifferen[t]" towards section 5. *House Hearings on H.R. 5589* at 133. The other witness, Herbert Smith, a representative of the National Carbon Company, which sponsored an entertainment program known as the "Ever-Ready Hour," recommended an amendment to section 5 to eliminate any confusion about what it required when a firm sponsored an entire entertainment program rather than a commercial. *Id.* at 82-85. Representative Davis reiterated his concern that radio stations should be required to identify advertisements, lest the audience be deceived into believing that the station itself sponsored the broadcast, *id.* at 83-87, but disagreed with Mr. Smith's amendment solely on questions of language. *Id.* With only minor changes in language, the committee adopted the amendment.

The Senate referred H.R. 9971 to the Committee on Interstate Commerce, which had already held its own hearings on two Senate bills to regulate radio communications. *Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. (1926). Neither of these proposals contained a sponsorship identification section, *id.* at 1 (reprinting S. 1), 1-8 (reprinting S. 1754), and neither the witnesses who testified at these hearings nor the Senators who were present proposed that one should be added. Ultimately, the Committee substituted a greatly revised bill for H.R. 9971, *see* S. Rep. No. 772, 69th Cong., 1st Sess. 1 (1926), in which section 5 was nonetheless incorporated in the same form that the House had passed. *See* 67 Cong. Rec. 12,502 (1926) (remarks of Senator Dill). The only reference to the sponsorship identification requirement in the Senate Committee's Report was the statement that "[a]ll matter broadcast for hire shall be announced as paid material . . . ." S. Rep. No. 772, *supra*, at 4.

In the Senate debate on its version of H.R. 9971, there was no substantial discussion of the sponsorship identification provision. Section 5 of the House proposal, as approved by the Senate Interstate Commerce Committee, was left unchanged in the final modified version of H.R. 9971 that was passed by the Senate and referred to a Conference Committee. 67 Cong. Rec. 12,618 (1926). The compromise reached by the Conference Committee in turn adopted section 5, renumbered as section 19 of the Conference Committee bill, without substantial change. H.R. Conf. Rep. No. 1886, 69th Cong., 2d Sess. 18 (1927). After some debate, both chambers accepted the Conference proposal, including section 19. 68 Cong. Rec. 2580 (1927) (House vote); 68 Cong. Rec. 4155 (1927) (Senate vote). The President later signed the Radio Act of 1927 into law.[8]

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[8] As enacted this section read as follows:

SEC. 19. All matter broadcast by any radio station for which service, money, or any other valuable consideration

The legislative history of the Radio Act of 1927 shows that the sponsorship identification provision imposed only a very limited obligation upon broadcasters: to announce that a program had been paid for or furnished to the station by a third-party and to identify that party. We have neither found nor been pointed to any indication that Congress contemplated that section 19 might require broadcasters to investigate whether a party purchasing commercial time was acting on his own behalf or as an agent for someone else.

Similarly, we have not discovered any evidence outside the formal legislative history that suggests that Congress or the legal community believed that section 19 required broadcasters to undertake investigations. The contemporary literature thoroughly canvassed what were then thought to be the major provisions and purposes of the Act,[9] and the sponsorship identification provision was

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is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.

Ch. 169, 44 Stat. 1162, 1170.

[9] *See* Ashby, *Legal Aspects of Radio Broadcasting*, 1 Air L. Rev. 331 (1930); Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 Air L. Rev. 295 (1930); Caldwell, *Censorship of Radio Programs*, 1 J. Radio L. 441 (1931); Chamberlain, *The Radio Act of 1927* (pts. 1-2), 13 A.B.A.J. 343, 368 (1927); Chapman, *The Power of the Federal Radio Commission to Regulate or Censor Radio Broadcasts*, 1 Geo. Wash. L. Rev. 380 (1933); Davis, *The Radio Act of 1927*, 13 Va. L. Rev. 611 (1927); Davis, *International Radio Relations*, 16 Geo. L.J. 400 (1928); Donovan, *Origin and Development of Radio Law* (pts. 1-3), 2 Air L. Rev. 107, 349, 468 (1931); Nordhaus, *Judicial Control of the Federal Radio Commission*, 2 J. Radio L. 447 (1932); Rowley, *Problems in the Law of Radio Communication*, 1 U. Cinn. L. Rev. 1 (1927); Webster, *Our Stake in the Ether*, 17

hardly noticed. The commentators who made reference to section 19 limited their discussion to a restatement of its language.

2. In the years immediately following the passage of the 1927 Act, section 19 provoked no controversy whatever. Congress returned to the subject of communications in 1934 not to redress major perceived inadequacies in the existing legislation but simply to refine the system it had already established. As stated in section 151 of the Communications Act of 1934,[10] its purpose was to promote the effective and efficient use of communications for the public and private weal by augmenting existing regulatory authority and centralizing that authority in the hands of one agency, the newly created Federal Communications Commission.[11] The legislative history of the 1934 Act reveals no dissatisfaction with the existing sponsorship identification requirement. Section 19, renumbered as section 317, was neither amended nor debated.[12]

A.B.A.J. 369 (1931); Webster, *Notes on the Policy of the Administration with Reference to the Control of Communications*, 5 Air L. Rev. 107 (1934); White, *History of Radio Legislation in the United States*, 2 J. Radio L. 179 (1932); Note, *The Constitutionality of the 1927 Radio Act and Amendments*, 1 Air L. Rev. 127 (1930); Note, *Radio Act of 1927—Constitutionality of Davis Amendment*, 4 Air L. Rev. 182 (1933); Note, *The Radio Act of 1927*, 27 Colum. L. Rev. 726 (1927).

[10] The Communications Act of 1934, ch. 652, § 151, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 *et seq.* (1976)).

[11] See National Broadcasting Co. v. United States, 319 U.S. at 214; FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940); 1 A. Socolow, *The Law of Radio Broadcasting* § 47, at 54; § 48, at 55 (1939); H. Warner, *Radio and Television Law* § 102, at 795-96 (1948); McManus, *Federal Legislation Regulating Radio*, 20 S. Cal. L. Rev. 146, 154 (1947).

[12] The Senate, House, and Conference Committee Reports each indicated that section 317 of the new Act readopted section 19 of the 1927 Act. S. Rep. No. 781, 73d Cong., 2d Sess. 8 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 2, 7 (1934);

3. After 1934, Congress devoted little if any attention to section 317 until scandals in the broadcast industry surfaced in the late 1950s. It was learned at that time that record companies made secret payments to disc jockeys to play certain records (a practice known within the industry as "payola") and that game show contestants had been provided with answers to questions beforehand in order to enhance the dramatic quality of the programs. Both the Attorney General [13] and congressional committees [14] investigated. The practices disclosed led

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H.R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 47 (1934). The only difference between section 19 and section 317 was that section 317 omitted the reference to "firm, company, or corporation" after the reference to "person" in section 19.

Like its predecessor, section 317 of the 1934 Communications Act did not receive any special attention by the legal community. Commentary on section 317 was, again, typically limited to a restatement of the terms of the statute. *See, e.g.*, Note, *Communications Act of 1934*, 21 Va. L. Rev. 318, 322 & n.31 (1935).

[13] Report to the President by the Attorney General on Deceptive Practices in Broadcasting Media (1959), *reprinted in Investigation of Regulatory Commissions and Agencies, Interim Report of the Subcomm. on Legislative Oversight*, H.R. Rep. No. 1258, 86th Cong., 2d Sess. (1960).

[14] *Investigation of Television Quiz Shows: Hearings Before the Legislative Oversight Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. (1959); *Investigation of Regulatory Commissions and Agencies, Interim Report of the Subcomm. on Legislative Oversight*, H.R. Rep. No. 1258, 86th Cong., 2d Sess. (1960); *Responsibilities of Broadcasting Licensees and Station Personnel: Hearings on Payola and Other Deceptive Practices in the Broadcasting Field Before the Legislative Oversight Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. (1960); *Communications Act Amendments: Hearings on Conditional Grants, Pregnant Procedure, Local Notice, Local Hearings, Payoffs, Suspension of Licenses, and Deceptive Practices in Broadcasting Before the Communications and Power Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. (1960). *See also Proposed Amendments to FCC Act of 1934: Hearing*

Congress to amend section 317 in 1960. The most important feature of the amendments, for present purposes, was the addition of subsection (a)(2).

As noted above, the language of subsection (a)(2) authorized the FCC to require licensees to make "an appropriate announcement" if the licensee broadcast political or controversial material, even if it had received that material free of charge. The legislative history pertinent to that subsection is sparse but indicates that Congress adopted it in order to ratify regulations adopted by the Commission in 1944,[13] which had expanded a

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on S. 1898 Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 86th Cong., 2d Sess. (1960).

[13] These regulations provided in pertinent part:

Section 3.409 *Sponsored programs, announcement of.*

(a) In the case of each program for the broadcasting of which money, services, or other valuable consideration is either directly or indirectly paid or promised to, or charged or received by, any radio broadcast station, the station broadcasting such program shall make, or cause to be made, an appropriate announcement that the program is sponsored, paid for, or furnished, either in whole or in part.

(b) In the case of any political program or any program involving the discussion of public controversial issues for which any records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a station as an inducement to the broadcasting of such program, an announcement shall be made both at the beginning and conclusion of such program on which such material or services are used that such records, transcriptions, talent, scripts, or other material or services have been furnished to such a station in connection with the broadcasting of such program: *Provided, however,* That only one such announcement need be made in the case of any such program of five minutes' duration or less, which announcement may be made either at the beginning or the conclusion of the program.

(c) The announcement required by this section shall fully and fairly disclose the true identity of the person or

licensee's obligations in several ways. *See* H.R. Rep. No. 1800, 86th Cong., 2d Sess. 24-25 (1960); S. Rep. No. 1857, 86th Cong., 2d Sess. 5 (1960).[16] In particular,

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persons by whom or in whose behalf such payment is made or promised, or from whom or in whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (b) hereof are furnished. Where an agent or other person contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known to the station, the announcement shall disclose the identity of the person or persons in whose behalf such agent is acting instead of the name of such agent.

(d) In the case of any program, other than a program advertising commercial products or services, which is sponsored, paid for or furnished, either in whole or in part, or for which material or services referred to in paragraph (b) hereof are furnished, by a corporation, committee, association or other unincorporated group, the announcement required by this section, shall disclose the name of such corporation, committee, association or other unincorporated group. In each such case the station shall require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group shall be made available for public inspection at one of the radio stations carrying the program.

9 Fed. Reg. 14,734 (1944) (codified at 47 C.F.R. § 3.409 (Supp. 1944)).

[16] The House Report stated:

Proposed section 317(a)(2)

This subsection makes it clear that the instant legislation is not intended to change the Commission's present requirement that an announcement be made in the case of any political program or any program involving the discussion of any controversial issue even where the program matter is furnished without charge or at a nominal charge as an inducement to the broadcast of the program. Thus, an announcement in these circumstances may be required even though, in fact, the matter broadcast is not "paid" matter. However, the Commission in 1944, with the

subsection (c) of these regulations required that a licensee "fully and fairly disclose the true identity of the person or persons by whom or in whose behalf" the licensee was paid or from whom the licensee received political or controversial program material. 9 Fed. Reg. 14,724 (1944) (codified at 47 C.F.R. § 3.409(c) (Supp. 1944)). In addition, "[w]here an agent or other person contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known to the station," the station was required to identify the principal rather than the agent when it made the sponsorship announcement. *Id.*

Congress' ratification of these Commission regulations did not impose any burden of independent investigation upon licensees. We have seen that the language of section 317, of itself, does not do so, and it is equally plain that the regulations do not. Subsection (c) of the regulations requires disclosure by the licensee but does not require investigation. The inference that the licensee is required to disclose only what he knows without investigation is fortified by the further statement in subsection (c) that where an agency relationship exists "and such fact is known to the station," the licensee must identify the principal rather than the agent. The regulation did not say, as it easily could have done, that such identification must be made when the licensee could

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concurrence of the broadcast industry, promulgated a rule to this effect. The broadcast industry at no time has raised objection to the announcement requirement in these situations. In order to provide specific statutory authority for the requirement of an announcement here, the substance of the Commisison rule has been included as subsection (a) (2) of the amended section 317.

H.R. Rep. No. 1800, *supra*, at 24-25. The Senate Report only stated that "Subsection (a) (2) of proposed section 317 would permit the Commission to continue in existence its rule regarding political programs or controversial issues." S. Rep. No. 1857, *supra*, at 5.

learn of the agency or that the licensee must inquire if circumstances give reason to suspect an undisclosed principal. The regulations Congress ratified imposed an extremely limited duty upon licensees.

Nothing in the legislative history suggests that Congress was aware of any "payola"-like scandals or problems akin to "payola" in the realm of political programming. Nor was Congress acting against a background of significant Commission interpretation of its own regulations that Congress may be presumed to have adopted. The one significant Commission action prior to Congress' 1960 amendment of section 317 came in *Albuquerque Broadcasting* Co., 40 F.C.C. 1 (1946). The licensee there had written to the Commission for clarification of its responsibilities with respect to the identification of sponsors of political broadcasts. The Commission's reply stated, somewhat unhelpfully, that a licensee's compliance would be judged on a case-by-case basis. *Id.* The Commission gave only one illustration:

> For example, if a speaker desires to purchase time at a cost apparently disproportionate to his personal ability to pay, a licensee should make an investigation of the source of the funds to be used for payment. This is particularly true in a case where the speaker has previously appeared on similar broadcasts sponsored by others, and announces the fact that he is resuming his broadcasts.

Id. The principle being applied by the Commission was, apparently, that a licensee had not merely a duty to announce the true sponsor when that sponsor's identity was known to the licensee, but that circumstances might raise such a suspicion in the mind of a reasonable man that the licensee was placed under a duty to take affirmative action to learn the identity of the true sponsor. The Commission took no position, however, on how extensive the required investigation must be. For example, if the speaker insisted that he was the real principal,

must the licensee demand to know the source of his funds, require an affidavit of him, and interview persons who might know the situation? Does the extent of the licensee's obligation vary according to the remoteness of the witnesses and evidence and the licensee's resources? The singularly unhelpful nature of the Commission's advice was highlighted by its further observation: "Nor would the fact that an independent investigation is necessary in a particular case, automatically relieve a station from its responsibility to make its facilities available to the person in question." *Id.*[17]

Had Congress known of *Albuquerque Broadcasting*, and had it intended to ratify that letter of advice in amending section 317, the result would be merely that a licensee was put upon some undefined duty of inquiry

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[17] In a series of opinions rendered between 1958 and 1960, which coincided with the period during which the Attorney General and Congress were conducting their investigations, the Commisison held that several licensee stations had violated their section 317 obligations by failing to disclose that they had received free summaries of certain Senate hearings from the National Association of Manufacturers. 40 F.C.C. at 12-65. Although the Commission noted in some of these cases that material of a politically controversial nature should alert licensees to be especially diligent about the obligations imposed by section 317, the Commission's pronouncement was made in the context of licensee failure to make any announcement at all and thus does not indicate the extent of licensee responsibility to reject an identification provided by the party who supplied the material. The Commission also ordered all licensees to inform the Commission of all broadcasts they had made for compensation in the past year and any internal controls they had established. *In re Sponsorship Identification Compliance*, 40 F.C.C. 66 (1959). The Commission also issued a discussion of its policies and practices, *In re Sponsorship Identification of Broadcast Material*, 40 F.C.C. 69 (1960), among other rulings. None of these rulings sheds significant light on the extent of any duty to investigate in circumstances such as those here where an identification has been made and the purported sponsor has submitted facially plausible information to support that identification.

when rather obtrusive facts suggested that the purported sponsor of a political broadcast was not the actual sponsor. There is, however, no indication that Congress even knew of the Commission's interpretation. *Albuquerque Broadcasting* was not explicitly referred to in the House Report, the Senate Report, or the floor debates in either chamber. *See* H.R. Rep. No. 1800, *supra*; S. Rep. No. 1857, *supra*. Thus, the Commission regulations as they existed and were interpreted at the time Congress ratified them by enacting subsection (a)(2) of section 317 give no reason to impute to Congress any desire to impose upon licensees a duty of wide-ranging investigation. Certainly, Congress expressed no such intention.[18]

The only remaining question then is whether subsequent actions by the Commission have expanded, and can legitimately expand, a licensee's duty to investigate.

C.

Following the 1960 statutory amendments, the Commission in 1963 issued new regulations that consolidated the existing regulations and the 1960 amendments. *In re Applicability of Sponsorship Identification Rules*, 40 F.C.C. 141, 143-44 (1963) (codified at 47 C.F.R. § 73.119 (1964)). The Commission did not decide an-

[18] The Senate Report describes the reasonable diligence requirement of subsection (c) as follows:

> The term "reasonable diligence" would require the licensee to take appropriate steps to secure such information, but it would not place a licensee in the position of being an insurer, nor does this condition permit a licensee to escape responsibility for sponsorship announcements by inactivity on his part.

S. Rep. No. 1857, *supra*, at 6. This explanation, while it establishes that a licensee cannot discharge its duty by passively ignoring sponsorship information it might easily obtain, nonetheless indicates that a licensee need not go behind the information it receives to guarantee its accuracy.

other case involving political broadcasts until *WHAS, Inc.*, 40 F.C.C. 190 (1964).

That case arose when an advertising agency purchased air time from WHAS to present "The Chandler Years in Review," a disparaging commentary on Albert Benjamin Chandler's tenure as Governor of Kentucky. Two days later, an agency employee told WHAS that the broadcast would be paid for by "The Business Friends for Breathitt," Breathitt being Chandler's opponent in a gubernatorial campaign. Other facts known to the station also gave it reason to know that the Breathitt campaign was paying for the telecast. Within a week, the advertising agency "corrected" its phone call to say that "The Committee for Good Government" would sponsor the telecast instead, and the program was broadcast under that name. 40 F.C.C. at 191-92.

The FCC held that WHAS violated its sponsorship identification obligation because the station was required to notify the public of the principal's identity, where it was known to the licensee, rather than simply identify the agent purchasing the air time.

The Commission sued to recover the forfeiture it had imposed. The district court, however, held that WHAS had not violated the sponsorship identification rules, *United States* v. *WHAS, Inc.*, 253 F. Supp. 603 (W.D. Ky. 1966). The Sixth Circuit affirmed, holding that subsection (d) of the regulations[19] gave the station the right to identify the payer as the sponsor even though subsection (c) might have been read to require that the actual sponsor be named when known to the station. *United States* v. *WHAS, Inc.*, 385 F.2d 784 (6th Cir. 1967). The court remarked that it was "by no means precluding the FCC from adopting a Regulation calculated to require a station to make reasonable efforts

[19] The relevant regulations were identical to those cited in note 15 *supra*.

to go beyond a named 'sponsor' for a political program in order to ascertain the real party in interest for purposes of announcement." *Id.* at 788.

The Commission did not respond to the *WHAS* decision by amending its regulations until 1975. The new regulations provided that where an agent makes arrangements with a station on behalf of another "and such fact is known or by the exercise of reasonable diligence . . . could be known to the station," the sponsorship announcement must disclose the name of the principal rather than the agent. 52 F.C.C.2d 701, 714 (1975). The Commission dismissed the argument of the National Broadcasting Company that it did not have the statutory authority to require a licensee to search for the true identity of a sponsor by relying upon the Sixth Circuit's *dictum* in *United States* v. *WHAS, Inc.*, 385 F.2d at 788. 52 F.C.C.2d at 708-09.

Prior to Loveday's petition, only the Commission has had occasion to interpret the 1975 regulations, as it did in *VOTER*, 46 Rad. Reg. 2d (P & F) 350 (1979). Westchester County, New York, had on its ballot a proposition to establish a county utility agency and to explore the development of a public power authority for the county. VOTER, a citizens committee that supported the proposition, complained that stations in the New York City area had broadcast paid advertisements in opposition to the proposition and had identified the advertisements as paid for by Westchester Citizens Against Government Takeover. In fact, VOTER alleged, the true sponsor was Consolidated Edison Company of New York, from which Westchester Citizens derived all or a very substantial part of its funds. Westchester Citizens replied that it had accepted substantial funds from Consolidated Edison but that no officer or employee of the utility was a member or eligible for membership in Westchester Citizens and that the latter paid for and controlled the content of the advertisements. The Broadcast Bureau ruled:

> Under the [Commission's] policies . . . , we cannot prohibit any licensee who chooses to do so from *adding* the identification you urge. However, we cannot conclude [that] any licensee, in evaluating the facts before it regarding the advertisement, failed to exercise reasonable diligence by accepting the representations of Westchester Citizens. The substantial proportion of Con Edison's role in Westchester Citizens funding might suggest a basis for further inquiry to some licensees. On the other hand the Westchester Citizens by-laws, represented assertion of editorial control over these advertisements, and the weight of precedent suggest that those licensees who accepted Westchester Citizens' advertisements as offered did so in good faith and without closing their eyes to any attempted misrepresentation. Indeed, some licensees may conclude, either on the facts thus far provided by the Westchester Citizens, or additional information not now before us, that, in its view, "Con Edison" alone is the appropriate identification. In such a case, we would have no basis for finding that the licensee has acted unreasonably.

46 Rad. Reg. 2d (P & F) at 352.

As the excerpt above suggests, the Commission has never indicated in enforcement proceedings that section 317 or its own regulations require a station to conduct any investigation or to look behind the plausible representations of a sponsor that it is the true party in interest.

D.

In light of our examination, we must reject petitioners' contention that the legislative history of the Communications Act requires the Commission to impose upon licensees a duty to investigate when they receive conflicting representations of the type involved here. If Congress intended to impose a duty of licensee investigation in a case of this sort, that intention was never made explicit in the statute or its history.

There are, moreover, good reasons why this court should not read into the statute or regulations the licensee duty petitioners seek to establish. The result, if we agreed with petitioners' argument, would be to create an administrative quagmire, to establish standards so variable as to invite abuse, and to raise possible constitutional questions. These are not merely reasons for a court to stay its hand, they are also reasons to doubt that Congress could have intended what petitioners argue.

Petitioners have been rather indefinite about what the California broadcasters were required to do when confronted by Kalish's allegations and Bergland's counter-allegations. The reasons for that vagueness may be suggested by an attempt to imagine the details of any process of further investigation. Broadcast companies are not grand juries. They have no power to subpoena documents or to compel the attendance of witnesses. They could, of course, refuse to broadcast unless all relevant documents and witnesses were produced for examination. If we make the rather implausible assumption that executives of the apparent sponsor, the advertising agency, and the alleged real sponsor would all cooperate, the result would be to judicialize the process of being allowed to utter a political statement. Having provided no clear indication that it contemplated such results, Congress cannot be presumed to have intended to place that burden, expense, and delay upon political speech. In the absence of such cooperation by the parties with whom stations deal, the alternative would be a field investigation by agents of the stations, involving requests for documents and interviews and, perhaps, observation of suspected persons. Again, the burden, expense, and delay would be considerable and in many cases possibly prohibitive. Section 317 can hardly have been designed to turn broadcasters into private detectives.

Even supposing a searching investigation to be a realistic possibility, the result of requiring it would be an

administrative quagmire. Broadcasters differ greatly in their resources and personnel, ranging from large stations in urban areas to small stations that often have no more than one person on the premises.[20] Similarly, the "sponsors" whom they would have to investigate may be large or small, nearby or geographically remote, cooperative or recalcitrant. The intensity of the investigation that will be practicable will vary according to the combination in a particular case of these and other factors. In the present case, for example, a spectrum of different duties of investigation would have to be applied to the radio and television licensees in California. The administrative burden such a system would impose on the Commission would surely strain, and might well be beyond, its powers. The series of hearings involved would probably require years to complete. Equally problematic is the question of fairness to the licensees, who would have to guess in every situation what the Commission would later find to be "reasonable diligence." Indeed, we cannot completely overlook the opportunities for abuse that such a variable and unknown standard would present should some future Commission use its powers for political purposes.[21] This constitutes an additional reason to insist that the regulatory rules to which licensees are subject be clear and not susceptible to manipulation.

Were we to approve a stringent obligation to investigate, one along the lines petitioners seek, the most likely result would be that many stations, in lieu of incurring the expense of the investigation and the risk that the Commission would later assess their duties differently, would try, possibly by imposing burdensome disclosure requirements on advertisers, to avoid carrying advertise-

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[20] *See* 106 Cong. Rec. 14,310-11 (1960) (remarks of Rep. Avery).

[21] It has been said that the fairness doctrine lends itself to use for partisan political purposes. *See* F. Friendly, *The Good Guys, the Bad Guys and the First Amendment* (1976).

ments of the type involved here. If so, opponents of groups sponsoring political messages would have a ready means of harassing and perhaps silencing their adversaries by making charges, however baseless, that the true sponsor of a political advertisement was someone other than the named sponsor. The rule petitioners seek might, therefore, have the effect of choking off many political messages. Quite aside from any First Amendment difficulties that such a rule might implicate, we are certainly not prepared to say that the public would be benefited from a decline in the number and variety of political messages it receives.[22] Even more certainly, any such decision concerning the public benefits of such a rule should come from Congress and not this court.

Finally, it may not be amiss to note that reading into the silences of the legislative history the duties that petitioners advocate would create a situation that is not entirely free of First Amendment concerns. Supreme Court decisions compel us to recognize that the First Amendment's protections of speech and the press are less strong where the broadcast media are concerned than they are with respect to the print media.[23] "[O]f all forms of

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[22] Only last year the Supreme Court wrote that "[i]n a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent." Brown v. Hartlage, 456 U.S. 45, 61 (1982). We believe the same can be said for ballot initiatives like the ones here, even when it is the identity of the speaker that is in issue rather than the content of his speech. Indeed, petitioners themselves admit that, despite the tobacco industry's alleged efforts to cover its trail during the Proposition 5 campaign, the California voters were well aware of the industry's involvement. JA at 22, 55; Petitioners' Opening Brief at 5, 12.

[23] *Compare* Talley v. California, 362 U.S. 60 (1960) (ban on anonymous leaflets invalid), *and* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (state law providing right of reply to political candidate attacked by newspaper invalid),

communication, it is broadcasting that has received the most limited First Amendment protection." *FCC* v. *Pacifica Foundation*, 438 U.S. at 748. Given the differences in the availability of access to the various types of media and their differences in impact, various rationales have been offered by the Supreme Court for the differences in constitutional protection. The rationale that applies most forcefully in the present context would seem to be the scarcity of available frequencies on the broadcast spectrum.

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.

National Broadcasting Co. v. *United States*, 319 U.S. at 226. Today when the number of broadcast stations not only far exceeds the number when the Communications Act was adopted and the number when the *National Broadcasting Co.* case was decided but rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried, it

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with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1981) (FCC fairness doctrine and implementing rules valid), *and* CBS, Inc. v. FCC, 453 U.S. 367 (1981) (statute providing political candidates right of access to broadcast stations and FCC's implementation of statute valid). *Compare* Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (ban on residential "For Sale" signs violates First Amendment), *with* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972) (mem.) (upholding ban on broadcast advertising of cigarettes over First Amendment challenge). *See also* Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913) (upholding, over First Amendment challenge, the postal law requiring second-class mail to identify advertisements that was the basis for section 317).

seems unlikely that the First Amendment protections of broadcast political speech will contract further, and they may well expand. As matters now stand, the protections accorded printed messages are not wholly irrelevant to broadcast freedoms. Thus, while it has been held unconstitutional for a city ordinance to require disclosure of the author of a printed statement, *Talley* v. *California*, 362 U.S. 60 (1960), such disclosure may apparently be required where the statement is broadcast. Nonetheless, even in broadcasting, where the law's attempt to discover the true utterers of political messages becomes so intrusive and burdensome that it threatens to silence or make ineffective the speech in question, the law presses into areas which the guarantee of free speech makes at least problematic. Before we would construe a statute or a regulation to have that effect, we would require a far clearer congressional directive that stations affirmatively seek out true sponsors than we have here.[34] The failure of Congress to address these questions thus provides an additional reason for doubting that Congress intended any rule such as petitioners urge. Had Congress so intended, there surely would have been some discussion of the practicalities of investigation, the difficulties of administration, the potential unfairness, and the constitutional questions that would follow from such a rule. The legislative history is bare of any such concerns.

These observations, which we note again are mentioned not to raise constitutional doubts but to discern legisla-

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[34] In construing the statute and regulations, we thus follow the tradition of adopting the reading that will avoid rather than implicate constitutional questions, *see* United States v. Security Industrial Bank, 103 S. Ct. 407, 412-14 (1982); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 509 (1979) (Brennan, J., dissenting); Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961); International Association of Machinists v. Street, 367 U.S. 740, 749 (1961); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

tive intent, determine the outcome of this case. The licensees had before them two short letters from Kalish containing unsupported allegations that the tobacco industry rather than Regulatory Excess was the true sponsor of the advertisements opposing Proposition 10 and demanding that the stations identify the industry as the sponsor. The licensees also had before them Regulatory Excess' replies stating that it was the real sponsor. In these circumstances, we find that the Commission could properly conclude that the stations were not required to investigate further. Indeed, given what we have said, it seems at least doubtful that the Commission was free to decide otherwise.[25] There may be cases where a challenger makes so strong a circumstantial case that someone other than the named sponsor is the real sponsor that licensees, in the exercise of reasonable diligence, would have to inform the named sponsor that they could not broadcast the message without naming another party. But that case is not before us today.

The Commission's decision that the California licensees satisfied their sponsorship identification obligation is not arbitrary, capricious, or an abuse of discretion. The Commission's interpretation of its own regulations as applied in this case is reasonable and consistent with section 317 of the Communications Act.

The decision of the Commission is therefore

Affirmed.

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[25] We have no occasion to address the Broadcast Bureau's dictum that, given the conflicting statements before them, the licensees were free to choose to comply with petitioners' request by simply substituting the tagline suggested by petitioners for that supplied by the party with whom they dealt.

APPENDIX B

FCC DECISION

APPENDIX B

FC 81-370

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re Request for Declaratory Ruling
of Paul Loveday and Californians for
Smoking and No Smoking Sections

ORDER

(Adopted: July 30, 1981; Released: August 7, 1981)

BY THE COMMISSION:

1. The Commission has before it an Application for Review, filed on November 28, 1980, by Paul Loveday et al, of the Broadcast Bureau's ruling of October 30, 1980.*

2. The Bureau's ruling (see Attachment A, page 7) stated the "(the complainants had not submitted) any conclusive evidence which establishes that the tobacco companies are exercising editorial control over CARE advertisements. . . ." To the extent that "conclusive" may imply an unwarranted burden on

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*A copy of that ruling is appended (Attachment A).

complainants in cases as these, we will modify the Bureau's ruling striking "conclusive." The Bureau's decision, with which we agree, was based primarily on a finding that the licensees did not act unreasonably. The information before the Bureau did not show that there was any editorial control of the CARE advertisements by "the tobacco companies."

3. Except as modified above, we believe the Bureau's ruling was correct, and the Application for Review does not contain sufficient grounds to warrant a reversal of the ruling. Therefore, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
William J. Tricarico, Secretary.

ATTACHMENT A

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

01127

Oct. 30, 1980

IN REPLY REFER TO:

8330-H
C10-1275
C10-1264
C10-997
C10-768

Mr. Paul L. Loveday
Attorney at Law
Two Embarcadero Center, 24th Floor
San Francisco, California 94111

In re: Request for Declaratory Ruling by "Californians for Smoking and No Smoking Sections."

Dear Mr. Loveday:

This is in reference to the Request for Declaratory Ruling that you filed on October 17, 1980 on behalf of the "Californians for Smoking and No Smoking Sections" (the "Committee") concerning advertisements opposing Proposition 10 by "Californians Against Regulatory Excess" ("CARE"). The Committee states that Proposition 10 represents "a measure

placed on the November 4, 1980 California election ballot by the signature initiative process" which would "create smoking and no smoking sections in indoor public places." The Committee supports the adoption of the Proposition 10; CARE opposes its adoption.

Background*

It is the Committee's contention that CARE is acting as the "agent and alter ego" of the tobacco industry[1] since CARE derives substantially all or "virtually 100% of its funds from the industry[2] and has relinquished editorial control over its advertisements to the industry. Essentially, the Committee's contentions are based on the following: (1) CARE and "Californians for Common Sense," organized to oppose a similar ballot proposition in 1978, retained the same legal counsel and advertising firm and further involved similar campaign themes and strategies; (2) the four largest cigarette manufacturers are "acting in concert"

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*Footnotes are at the end of this ruling.

by contributing funds to CARE according to their respective market shares in California, as was the case in 1978; (3) the tobacco industry took personal credit for defeating the 1978 ballot proposition;[3] (4) the four cigarette manufacturers "deferred massive spending on advertisements against Proposition 10 (until). . .the day after the cutoff date for disclosing campaign expenditures" allegedly to conceal their campaign involvement;[4] (5) CARE has employed former spokespersons for the Tobacco Institute to advocate its cause; and (6) Proposition 10 represents a "national campaign" launched by the tobacco industry to oppose restrictive legislation aimed at smoking, as evident by the activities in Dade County, Florida, where a similar ballot proposition is being considered.[5] The Committee also points out that CARE misrepresented its Board of Directors to the Californian licensees by including Mr. James Collins, the President of the California Restaurant Association, as a member. The Committee adds "only an exam-

ination of the files and records of Excess (CARE) can disclose how many other misrepresentations there are in Excess' (CARE's). . .letter to Station Managers."

The Committee concludes that given the significant financial support provided by the tobacco industry and its alleged control over the CARE campaign, the California broadcast licensees have not "adequately fulfill(ed) their obligations of reasonable diligence" and "have participated with the Tobacco Industry in acts of affirmative deception by running a sponsorship identification statement ("Tag-line") stating that such advertisements were 'Paid for by Californians Against Regulatory Excess' when in fact" they were paid for by the tobacco industry.[6] The Committee is requesting that the Commission: (1) declare that the sponsorship identification statement attached to CARE advertisements is "misleading" and in violation of Section 317(c) of the Communications Act and Section 73.1212 of the Commission's Rules and Regulations; and (2) direct

all California broadcast station licensees to identify all CARE advertisements as "paid for by the Tobacco Industry" rather than "Californians Against Regulatory Excess."

In support of its request, the Committee cites Amendment of the Commission's "Sponsorship Identification" Rules (Section 73.119, 73.289, 73.789 and 76.221), 52 FCC 2d 701 (1975); In re KOOL-TV, 26 FCC 2d 42 (1970); and United States v. WHAS, Inc., 385 F.2d 784 (6th Cir. 1967). The Committee distinguishes the instant case from VOTER, 46 RR 2d 350 (B/c. Bur. 1979) and National Welfare Rights Organization, 41 FCC 2d 187 (1973), since here the tobacco industry allegedly has exercised editorial control over CARE advertisements.

The Committee asserts that the time is of the essence, in light of CARE's "media blitz" during the final days before the election which has swayed voters to oppose Proposition 10, according to recent polls. The Committee believes that if the CARE advertisements are "properly" identified as paid for by the

tobacco industry, the "credibility" of such advertisements would be diminished in the eyes of the voters.[7]

On October 27, 1980, by its attorney, CARE filed its response.[8] CARE represents that it is a bona fide nonprofit corporation and political committee, with 12 Board members,[9] organized for the purpose of "educat(ing) California voters about excessive government regulation, and specifically, to oppose a California state ballot measure, supra, and contends that the California broadcast station licensees "have acted properly and within their discretion in concluding that (it) is the entity, and the only entity, they must identify as sponsor of (CARE's) political spot announcements." CARE asserts that it has "wholly and fairly disclosed its contributions under California's campaign reporting and disclosure laws" and although "the four tobacco companies are the major contributors," a fact which has been "widely publicized,"[10] CARE exercises "editorial control over its spot ads"

and "it is not controlled by the tobacco companies."

CARE rejects the allegations contained in the Committee's request and states that:

> (1) The campaign management of (CARE) is independent of any and all tobacco companies and any of its trade associations.
>
> (2) The use of (CARE) of some experts who have previously worked on anti-smoking campaigns, which employment was sometimes by design and sometimes by coincidence, is demonstrative of good management and not of conspiratoral intentions.
>
> (3) The allegations that (CARE's) campaign is similar to the 1980 Dade County Florida anti-smoking campaign is not at all substantiated and is false.
>
> (4) The allegations that (CARE's) campaign is similar to the California Proposition 5 campaign in 1978 is correct. Committee acknowledges that it is appealing to the residue of voter disapproval of Proposition 5.

CARE added that it has not retained any current employee of the tobacco companies or the Tobacco Institute, but for the voluntary work of two employees of the Institute, who assist in the "distribution of literature throughout California."

CARE included a declaration of Richard S. Woodward, a partner of the advertising firm retained by CARE, in which he stated that his firm has contracted with CARE to prepare scripts and submit them to that organization's Board and legal counsel for clearance. Mr. Woodward also stated that Mr. Nelson, the organizer and campaign manager of CARE, was on site during most of the production of the CARE advertisements.

CARE states that the Committee is asking the Commission to determine whether or not a political committee is an independent, bona fide organization. CARE further states that broadcasters have the responsibility "to exercise reasonable diligence to determine the identity of who paid for sponsored material." CARE concludes by stating, "to shift that responsibility to the Commission would literally place the Commission in the 'thicket' of all political campaigns. . . ."

On October 26, 1980, counsel for the Committee contacted a staff attorney of this

office. The Committee asserted that CARE's document prove that the tobacco industry directs the campaign strategy and exercises editoral control over the CARE advertisements, which it believes is essentially demonstrated by the following:

(1) On July 27, 1980 a CARE "Update" was sent to its committee from Mr. Bergland, Chairman of CARE, which discussed the filing of a lawsuit challenging statements concerning Proposition 10, prior to any Board meeting, indicative of the Board's lack of control over campaign strategy;

(2) There were only four Board meetings held, only one of which was in person, the remainder were telephonic. Only one of the four meetings had a quorum. Thus, CARE's representations to California broadcast station licensees that the Board "meets regularly" is incorrect and moreover, CARE's actions are not in compliance with its bylaws.

(3) The Board meetings were conducted on 8/26/80, 10/6/80, 10/13/80, 10/20/80. The advertising firm of Woodward, McDowell & Larson was retained in September and CARE's advertisements were being aired on 9/30/80. The time sequence suggests that CARE's Board did not meet after the advertising firm was retained and before the advertisements were completed and carried by the stations. The Committee maintains that the CARE Board did not have an opportunity to preview the advertisements and, thus, did not exercise editorial control over their content.

On October 27, 1980, counsel for CARE responded to the Committee's reply, during a phone conversation with a staff attorney of this office. CARE stated that, due to an oversight, it neglected to mention the Board's first organizational meeting which was held on June 16, 1980. In attendance were Mr. Bergland, Mr. Dohr and Mr. Benson. CARE also explained that a political committee which is comprised of individuals with diverse interests, occupations and responsibilities, unlike a private corporation or an on-going organization, often experiences difficulties in scheduling meetings and commanding appearances at such, which accounts for its irregular meetings. CARE, however, states that Mr. Bergland (Chairman and President of the Board), Mr. Dohr (Treasurer) and Mr. Nelson (Senior Campaign Manager and Organizer of CARE) meet regularly, supervise the campaign and exercise complete editorial control over CARE advertisements. CARE denies that the tobaco industry exercises any control whatsoever over the organization's activities or strategies.

Discussion

The thrust of this request is that the sponsorship identification statements attached to CARE advertisements are inadequate and improper under Section 317 of the Communications Act and Section 73.1212 of the Commission's Rules and Regulations. To summarize, the Committee contends that the tobacco industry--specifically, the four major cigarette manufacturers--are the actual sponsors of CARE advertisements and the true strategists behind CARE's campaign drive and should be identified as such; CARE asserts that it exercises control over all of the advertisements and the campaign, not the cigarette manufacturers, and that the sponsorship identification statements are correct. Both organizations have contacted the various broadcast station licensees throughout California to make their positions known. The issue presented is whether the California broadcast station licensees have failed to exercise reasonable diligence to

identify the sponsor of the CARE advertisements.

Section 317 of the Communications Act provides, in pertinent part, that:

> (a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is broadcast, be announced as paid for or furnished, as the case may be, by such person. . .
>
> * * * * * * *
>
> (c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section (emphasis added).

The corresponding rule is contained in Section 73.1212 of the Commission's Rules and Regulations and provides, in pertinent part, that:

> (b) The licensee of each broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any matter for broadcast, information to enable such licensee to make the announcement required by this section.

* * * * * * *

(e) The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished. Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence as specified in paragraph (b) of this section, could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent (emphasis added).

The basic premise of the sponsorship identification requirements is that the public is entitled to know by whom they are being persuaded. VOTER, supra at 352; National Welfare Rights Organization, supra at 195; Applicability of Sponsorship Identification Rules, 40 FCC 141, 141 (1963).

Section 317 and Section 73.1212 impose a duty upon licensees to exercise reasonable

diligence to ascertain the identity of the sponsor of broadcast material. The obligation to exercise reasonable diligence to determine the actual sponsor of broadcast material, of course, does not cast licensees in the role of "insurers" as to the complete accuracy of sponsorship identification statements; they have an affirmative obligation to ascertain and identify the sponsor, no more--no less. National Welfare Rights Organization, supra at 195. The Commission's responsibilities in these matters is not to substitute its judgment for that of the licensees or to pass on the bona fide nature of an organization; rather the Commission, as a government licensing agency, reviews its licensees' decisions to determine if it can be said that they exercised reasonable diligence.

We believe that the Bureau ruling in VOTER, supra, is dispositive of this request. The case of VOTER concerned a ballot proposition (involving the establishment of a county public power system), in which advertisements

opposing the ballot were aired as being sponsored by a political committee ("Westchester Citizens"). The Committee was funded in substantial part or completely by the Consolidated Edison Company. The complainant argued that Con Edison should have been substituted or added to the sponsorship identification statement. The Committee admitted that it received substantial financial assistance from Con Edison, but maintained that it exercised editorial control over all of its advertisements.

After noting that "longstanding Commission policy has been that an entity paying for advertising time and editorial control over the message must be identified as the sponsor of the statement," the Bureau stated that:

> (W)e cannot conclude that any licensee, in evaluating the facts before it regarding the advertisement, failed to exercise reasonable diligence by accepting the representations of Westchester Citizens. The substantial proportion of Con Edison's role in Westchester Citizens funding might suggest a basis for further inquiry to some licensees. On the other hand the Westchester Citizens by-laws, represented assertion of editorial control over these advertisement, and the weight of precedent suggest that those licensees who accepted

> Westchester Citizens' advertisements as offered did so in good faith and without closing their eyes to any attempted misrepresentation. Indeed, some licensees may conclude, either on the facts thus far provided by the Westchester Citizens, or additional information not now before us, that, in its view, "Con Edison" alone is the appropriate identification. In such a case, we would have no basis for finding that the licensee has acted unreasonably (emphasis added). Id. at 352; see also, National Welfare Rights Organization, supra (announcements paid for by a private corporation, but controlled and directed by the American Academy of Pediatrics, were properly identified as "presented as a public service announcement by the American Academy of Pediatric").

In the same fashion, on the basis of all the information before us, we cannot determine that any California broadcast station licensee acted unreasonably by failing to exercise reasonable diligence in accepting the representation of CARE and ultimately airing the CARE advertisements as offered. On the other hand, if some licensees substituted the sponsorship identification statements with "Paid for by the Four Major Tobacco Companies," we would have no basis for concluding that they acted unreasonably.

The Committee submitted a rather voluminous record (consisting of studies, polls, newspaper articles and declarations) in an attempt to demonstrate that the tobacco companies are controlling CARE. While it has been shown that substantially all or "virtually 100%" of CARE's funds have come from the four major tabacco companies, a fact that CARE readily admits in its response, there has not been any conclusive evidence which establishes that the tobacco companies are exercising editorial control over CARE advertisements, or for that matter over CARE's entire campaign efforts or any other drive aimed at defeating similar legislation like that pending in California. More importantly, there has been no evidence that the California broadcast station licensees have dismissed this matter without exercising reasonable diligence to ascertain the true sponsor in compliance with their obligations under Section 317 and Section 73.1212.

Conclusion

Based on all of the foregoing, we cannot

conclude that any broadcast station licensee has violated the sponsorship identification provisions of the Communications Act or the Commission's Rules and Regulations. To hold otherwise would require this agency to investigate the nature of political committees organized to support or oppose an election matter (e.g., whether or not corporate formalities were adhered to), to second-guess broadcast station licensees' judgments and to rule on the basis of hindsight rather than reviewing licensees' decisions to determine if they acted reasonably and in good faith.

In closing, "we continue to urge caution and the exercise of reasonable diligence on the part of our licensees to take appropriate steps to ascertain the fullest factual information as to the true identity of political and controversial issue sponsors." VOTER, supra 352.

Due to the imminence of the election, pertinent parts of this ruling were relayed by phone conversation to the respective attorneys on October 30, 1980.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the release date of this letter by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

SINCERELY,

STEPHEN F. SEWELL, Acting Chief,
COMPLAINTS AND COMPLIANCE DIVISION,
BROADCAST BUREAU

FOOTNOTES

[1]The Committee apparently refers to the four largest cigarette manufacturers in the country as comprising an "entity", known as the "tobacco industry". Such manufacturers include Lorillard, R.J. Reynolds Tobacco, Brown and Williamson Tobacco Co. and Phillip Morris.

[2]According to the Committee, approximately 99.6% of CARE's financing comes from the tobacco industry (the four major cigarette manufacturers and to a small extent the tobacco distributors; The Committee's figures are derived from the financial disclosure statements that CARE filed in California pursuant to California election laws.

[3]In this connection, the Committee enclosed a newspaper article, entitled "The tobacco industry: How it snuffed out Proposition 5." The article quoted Richard Woodward, of Woodward, McDowell and Larson (the advertising firm that was retained by "Californians for Common Sense" in 1978 and CARE in 1980) and Ed Grefe, vice president for public affairs of Phillip Morris, as describing their campaign strategy to defeat the 1978 ballot proposition in California. The Committee asserts that this indicates that the tobacco industry exercised control over the campaign and editorial control over the advertisements.

[4]A comparison of the financial disclosure statements covering the periods of "1/8/80 through 9/23/80" (executed 9/29/80 and "9/24/80 through 10/20/80" (executed of 10/23/80) shows that the major cigarette manufacturers did, in fact, channel more funds into CARE during the latter period, in the form of loans or otherwise. However, this fact alone does not demonstrate that the cigarette manufacturers attempted to conceal their "support" of CARE.

[5]With respect to the "national compaign," the Committee enclosed a copy of an article that appeared in the United States Tobacco Journal, shortly after the ballot proposition was defeated in 1978, which warned that the "the entire tobacco industry. . .has an important stake in what happens in the nation's most populous state--a state which incidentially accounts for more than 9% of the nation's cigarette consumption--impacts nationally (as with "Proposition 3")." In addition, the Committee points out that the tobacco industry has also significantly contributed to the "Floridans Against Increased Regulation" ("FAIR"). Moreover, the Committee represents that the same agents have been employed in both the prior and the current campaigns in Florida and California. In fact, the advertising firm of Woodward, McDowell and Larson was retained in both prior campaigns, but is now only working for CARE on the California proposition. Lance Tarrance was the only "agent" retained in all four campaign drives by the respective political committees. Finally, the Committee contends that the tobacco industry, in an effort to alleviate the effect of adverse legislation that appears to protect nonsmokers but in reality does not." As an example of such "diluted" legislation, the Committee attached a copy of the 1978 Greene Bill (SB 2026). The financing disclosure statement filed by "Californians for Common Sense" in 1978 reveals a payment of $20,000 to state Senator Bill Greene, but it does not specify what services were rendered. It should be noted that none of these representations conclusively substantiate tobacco industry involvement.

[6]The Committee attached correspondence that it sent to all the California broadcast station licensees, advising them of their obligations to exercise "reasonable diligence" to ascertain the true identity of the entity on whose behalf advertisements are purchased. The Committee proceeded to explain that virtually all the funds received by CARE are from the

out-of-state tobacco industry, and thus the tag line "Californians Against Regulatory Excess" is deceptive and should be substituted with the "tobacco industry." In their response, CARE attached correspondence that it sent to the licensees which denied allegations that it was operating as a "front" for any person, company or industry, admitted that it received "tobacco" funds, but emphasized that it maintained control over CARE advertisements and campaign strategies. The Committee forwarded letters received by several stations which essentially denied their request for substitution of tag-lines on CARE advertisements. It should be noted that a sponsorship identification statement referring to the "tobacco industry" may be deceptive and misleading, in that there is no particular entity known as such, and further that CARE is, in fact, incorporated in California and has Californians serving on its Board.

[7]The Committee cites two studies, the Roper Poll of 1978 commissioned by the Tobacco Institute and the Fairbanks/Canapary/Maullin Poll commissioned by CARE, which indicate that the tobacco industry's "credibility" is low. The Committee further claims that the tobacco industry is cognizant of their low esteem, which explains "their" desire to operate through a "front organization" like CARE.

[8]A copy of that response was sent to a staff attorney of this office of October 25, 1980, at her request.

[9]As mentioned before, Mr. Collins has denied that he was a member of CARE's Board of Directors. By declaration of Eileen Padberg, of Robert Nelson and Associates (Robert Nelson organized CARE), CARE represents that it was its understanding that Mr. Collins was, in fact, serving on the Board and that all notices of meetings and other informative data was forwarded to him, accordingly. Eileen Padberg also stated that Mr. Kiker participated in one telephonic Board meeting on Mr. Collin's behalf and at his request.

[10] Both CARE and the Committee have furnished the Commission with newspaper articles which report the influx of the tobacco industry's financial support.

APPENDIX C

Pages 37-47 of Petitioners' Opening Brief in the Court of Appeals showing that the Board of Directors of Californians Against Regulatory Excess had no editorial control over No on 10 advertisements

APPENDIX C

The following constitutes Section IV of Petitioners' Opening Brief in the Court of Appeals:

A. The No on 10 Campaign Management Firm Was Not Retained By The Excess Board Of Directors; Instead The Tobacco Industry's Campaign Management Firm Recruited The Excess Board Of Directors.

The most important decisions in any California statewide political campaign are the choice of a campaign manager and the choice of an advertising firm. The person or entity with the power to hire and fire the campaign manager and advertiser controls the campaign and its advertising. A declaration filed by Dobbs & Nielsen with the FCC proves that the Board of Directors of Excess was <u>not</u> the entity which retained the No on 10 campaign manager. A notice of an Excess Board meeting filed with the FCC by Dobbs & Nielsen together with reasonable inferences drawn from Dobbs & Nielsen's refusal to provide the FCC with minutes of Excess Board meetings demonstrate that the Board of Directors of Excess was <u>not</u>

the entity which retained the No on 10 advertising firm.

Eileen Padberg, the No on 10 co-campaign manager, stated in her declaration which was attached as an Exhibit to the Excess Opposition Brief that:

> I am a Vice President of Robert Nelson and Associates, Inc., the campaign firm retained to manage the opposition campaign to Proposition 10. When I was assigned to this account, Bob Nelson has already begun to organize the Board of Directors and a number of persons had already agreed to serve. Mr. Nelson had contacted:
>
> David Bergland, Chair, Libertarian National Committee
> John Seymour, President, California Association of Realtors
> Bill Dohr, Secretary, California Republican Party
> Marvin Wendt, Assistant Director of Patient Services, UCI Medical Center
>
> Once I began working on organizational matters of Californians Against Regulatory Excess, I contacted the following persons to serve as directors: (list omitted. Emphasis added.)[85]

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[85] Declaration of Eilen Padberg on p. 152 of Joint Appendix.

Ms. Padberg's declaration makes clear that the No on 10 campaign management firm was "retained" by someone, but that the firm was not retained by the Excess Board of Directors. Quite the contrary, Ms. Padberg reveals that the Tobacco Industry's campaign managers recruited persons to serve on Excess' pro-forma Board after the campaign was under way. The declaration reveals that the campaign management firm already had a No on 10 "account" before the Excess Board of Directors was even formed. Ms. Padberg's declaration unwittingly demonstrates that the Excess Board of Directors were the creation of Robert Nelson and Eileen Padberg, professional campaign agents for the Tobacco Industry.

The notice of the sole Excess Board of Directors meeting held prior to the hiring of Woodward, McDowell & Larson to do the No on 10 advertising contained an agenda for that meeting.[86] No mention was made of a hiring

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[86] The agenda for the Excess Board meeting was filed with the FCC as Exhibit M to the Excess Opposition Brief and is on p. 155 of the Joint Appendix.

of an advertising firm in such notice. Had the Excess Board considered which advertising firm it should retain during such meeting, it is certain that Dobbs & Nielson would have filed the minutes of such meeting with the FCC. They did not file such minutes because the Excess Board had no part in the decision to hire Woodward, McDowell & Larson. The Tobacco Industry had already made the choice.

B. Excess Records Show That The Excess Board Of Directors Did Not Fulfill Any Policy Making Or Supervisory Functions.

The broadcast stations relied upon Dobbs & Nielsen's statement that the "leadership and direction for (the No on 10 campaign) vests in its Board of Directors. . .which makes decisions and supervises the campaign management firm."[87] Excess records filed with the FCC demonstrate that the Excess Board members recruited by the campaign management firm were merely informed of policy decisions after the fact, but had no part in formulating those policy decisions.

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[87] J.A. 122.

Excess was incorporated on June 12, 1980. Declarations by Eileen Padberg and by a Dobbs & Nielsen lawyer both state that the first meeting of the Excess Board of Directors was not held until August 26, 1980 -- two-and-one-half months after Excess' incorporation.[88] Thus, before members of Excess' Board had

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[88] Both the Declarations of Eileen Padberg, the co-campaign manager for No on 10, and Barry Fadem, Esq. of Dobbs & Nielsen stated that the first Excess Board Meeting was on August 26, 1980. Such Declarations were attached as Exhibits N and Q to the Excess Opposition Brief and are on pp. 153 and 159 of the Joint Appendix. When the Broadcast Bureau called Dobbs & Nielsen's attention to their attorney's and Eileen Padberg's declarations, Dobbs & Nielsen responded to the Broadcast Bureau that "due to an oversight, it neglected to mention the Board's first organizational meeting which was held on June 16, 1980." See page 4 of Broadcast Bureau's Denial on p. 5 of the Joint Appendix. Review of the minutes of such "meeting" would demonstrate that the only action taken at such meeting was to adopt the boilerplate first meeting resolutions that Dobbs & Nielsen and every other law firm in California has stored in their word-processing machines. We would suggest that the "oversight" by the Dobbs & Nielsen attorney and Eileen Padberg resulted from the fact that the June 16, 1980 "meeting" most likely took place in the word-processing center of Dobbs & Nielsen.

their first meeting, the No on 10 campaign management firm Robert Nelson and Associates, Inc. made at least eight major decisions that would have been the subject of extensive discussion by Excess Board members had the Excess Board of Directors actually controlled the campaign. Robert Nelson and Associates, Inc. (i) brought and lost a major lawsuit,[89] (ii) determined who would do all the No on 10 public opinion polling and spent approximately $32,000 on polls, (iii) determined who would do the No on 10 legal work and incurred very substantial legal fees, (iv) paid itself $33,000 to $63,000 in consulting fees, (v) opened two offices and hired two large and well-paid campaign staffs, (vi) held a press conference, (vii) printed brochures, posters and fact sheets, (viii) wrote the argument

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[89] The lawsuit, which was brought by Excess, resulted in a finding by Judge Perluss of the California Superior Court that numerous statements Excess made in its argument against Proposition 10 in the Voters Pamphlet distributed to all registered voters by the Secretary of State were "false and misleading". See n. 41 supra.

against Proposition 10 that was printed by the California Secretary of State and distributed in a voters pamphlet to the home of every registered voter in California, and (ix) received substantial contributions from the Tobacco Industry.[90] Despite these activities--many of which are considered crucial to a ballot proposition campaign in California, the Excess Board of Directors had never met.

Additional Excess records further demonstrate that the so-called "Board Members" did not formulate campaign policy. The records show that Board Members were not even consulted on crucial decisions, but were merely "updated" about major campaign decisions after those decisions were made. For example, the July 27, 1980 notice[91] informed the Excess Board Members that Excess would file a major lawsuit (which

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[90] These facts are taken from Exhibit I to the Excess Opposition Brief which is on pp. 179-208 of the Joint Appendix.

[91] A copy of the July 27, 1980 notice to Excess Board members is on p. 155 of the Joint Appendix.

it subsequently lost) against Yes on 10 and would announce the lawsuit at a press conference. The notice did not call a meeting to discuss whether the suit should be filed or even invite input from Board Members. The same July 27th notice informed Board Members that there would be a "strategy update" at the first Board meeting. The notice did not state that the Board Members would formulate, discuss, or even approve strategy. Board Members were informed that they would merely be "updated" on strategy and were notified of major decisions that had already been made.

One person whom the Tobacco Industry attorneys represented to the stations as being an Excess Board Member reported during the campaign that he was competely unaware of his Board membership.[92] Another Excess Board Member, when asked by a television show moderator about the most fundamental issue facing campaign policymakers, campaign finance,

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[92] See declaration on p. 160 of the Joint Appendix.

responded that she was only a volunteer and knew little or nothing about such things.[93]

C. Excess Records Show That The Excess Board Did Not Meet Weekly As Claimed By Dobbs & Nielsen In Its Letter To The Broadcast Stations.

The first actuall meeting of the Excess Board was on August 26, 1980, two and one-half months after Excess' incorporation. It is unlikely that another Board meeting would ever have been called had two letters from Yes on 10 counsel dated September 26, 1980 and October 3, 1980 not been sent to Stations Managers regarding advertising sponsorship identification. Immediately after receipt of those two letters, three Excess Board Meetings were called for October 6th, 13th and 20th. All three were telephonic meetings.[94] At none of the three

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[93] A transcript of the relevant part of the television program is on p. 161-162 on the Joint Appendix.

[94] Declaration of Eileen Padberg, J.A. 153.

meetings was a quorum present.[95] The stations, having been put on notice of misrepresentations by Excess, could easily have verified the falsity of Dobbs & Nielsen's claim by requesting minutes of the Board meetings.

D. Excess Records Prove That The Excess Board Of Directors Had No Editorial Control Over No On 10 Advertisements.

The record demonstrates that the stations unreasonably relied upon Dobbs & Nielsen's misrepresentation that the Excess Board of Directors exercised editorial control over No on 10 advertising. The stations could have

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[95] The conclusion that a quorum was not present at any of the telephonic "meetings" of the Excess Board of Directors on October 6, 13 and 20 comes from (i) Section 6 of Article IV of the Excess Bylaws, J.A. 167, which requires a simple majority of Board Members to constitute a quorum; (ii) the Excess Opposition Brief, J.A. 145-146, which represents there were twelve Excess Board members; and (iii) Exhibit N to the Excess Opposition Brief, J.A. 159, which shows that less than a majority of Excess Board members were on the line at each of the three telephone "meetings." Thus, it can be seen that Excess did not even observe corporate formalities. The so-called "Board of Directors" had only one meeting at which a quorum was present and at which it was permitted by the bylaws of Excess to conduct business.

determined the truth regarding such editorial control merely by consulting their own records regardings the commencement date of No on 10 advertisements and by asking simple questions of Excess representatives.

Excess records filed with the FCC show that Woodward, McDowell and Larson (the advertising firm which conceived, wrote, cast, produced and edited No on 10 advertising) was retained in September of 1980.[96] No on 10 advertisements were first aired on September 30, 1980.[97] Excess records show that the first actual Board Meeting of Excess took place on August 16, 1980 (before Woodward, McDowell and Larson was retained and before that firm began to conceive and write advertising copy), and the second purported Excess Board Meeting (at which no quorum was present) was held on October 6, 1980 (after the No on 10 advertise-

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[96] See Declaration of Richard S. Woodward, J.A. 17.

[97] See Declaration of Robert DeVries, J.A 89.

ments were already on the air).[98] Since the Excess Board Members did not meet between the time Woodward, McDowell and Larson was retained and the time No on 10 advertisements were on the air, it is obvious that the Excess Board not only had no advertising editorial control, but that the Board was not even shown the No on 10 advertising spots until they were already aired.

E. The Attorneys for the Cigarette Manufacturers Admitted to the FCC the Falsity of Their Statements Upon Which the Stations Unreasonably Relied.

The failure of the stations to exercise due diligence is underscored by the admission by Dobbs & Nielsen that their statements upon which the stations relied were false. In an October 27, 1980 telephone conversation, an FCC attorney confronted Dobbs & Nielsen with the facts stated above. Dobbs & Nielsen promptly changed its position regarding editorial control by the Excess Board of Directors and

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[98] See Declarations of Eileen Padberg and Berry Fadem, Esq., J.A. 153 and J.A. 159, respectively.

admitted that the No on 10 campaign experienced "difficulties in scheduling meetings and commanding appearances" of Excess Board Members.[99] Despite the admission of its prior falsehood, Dobbs & Nielsen nevertheless asked the FCC to believe its denial "that the Tobacco Industry exercises any control whatsoever" over No on 10 advertisements."[100] Although admitting the Board of Directors had no such editorial control, Dobbs & Nielsen asked the FCC to believe that such editorial control resided in Robert Nelson (who was hired and paid by the Tobacco Industry) and in two members of the Excess Board.[101]

F. Neither Dobbs & Nielsen (the Cigarette Manufacturers' Attorneys) Nor Excess Spokespersons Should Be Believed.

Due to the September 26 and October 3, 1980 letters from Yes on 10 counsel,

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[99] See page 4 of Broadcast Bureau's Denial on p. 5 of Joint Appendix.

[100] See p. 4 of Broadcast Bureau's Denial on p. 5 of Joint Appendix.

[101] Id.

the stations were on notice that Excess was involved in a scheme to deceive and that Excess had already lied regarding Tobacco Industry involvement in the campaign. It was not an exercise of reasonable diligence for the stations to accept the misrepresentations of Excess or Dobbs & Nielsen since the stations could easily have determined those statements to be false. Nor should the Court accept Dobbs & Nielsen's denials of Tobacco Industry editorial control, given the long list of misrepresentations by Dobbs & Nielsen and Excess spokepersons which are chronicled on pages 9-13 supra, and the apparent perjury of Vigo Nielsen during the 1978 Proposition 5 campaign:

On August 11, 1978, Vigo Nielsen testified in a California court of law that he did not remember who it was who asked him to incorporate and to represent Californians for Common Sense (the Tobacco Industry's equivalent of Excess in the 1978 Proposition 5 campaign)

and that he did not know whether Californians for Common Sense was "represented or in any way associated with the Tobacco Industry".[102] Mr. Nielsen made this statement after his firm prepared the campaign financing disclosure statements revealing (i) that virtually all monies transferred to Californians for Common Sense came from the Tobacco Industry, (ii) that the Tobacco Institute, the trade organization of the Tobacco Industry, had established Californians for Common Sense, (iii) that Dobbs & Nielsen represented the Tobacco Institute and (iv) that Vigo Nielsen was the Treasurer of the Tobacco Institute's No on 5 campaign committee.[103]

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[102] See transcript of California Superior Court hearing on pp. 45-50 of Joint Appendix.

[103] See the Tobacco Institute's No on 5 campaign finance disclosure statements, J.A. 305 and analysis and backup of the No on 5 campaign's spending J.A. 297-355. As corroboration of the financial disclosure statements, see the Declaration of Richard Woodward in which he admits he was hired by the Tobacco Institute, J.A. 16.

G. The Excess Opposition Brief Failed to Cite One Example of the Exercise of Editorial Control of No on 10 Advertising by Any Excess Board Member.

The No on 10 advertising was done by Woodward, McDowell and Larson, the principals of which were introduced at the American Association of Political Consultants as "campaign strategists for the Tobacco Industry."[104] The use of "the campaign strategists for the Tobacco Industry" by the No on 10 campaign is evidence of Tobacco Industry editorial control of No on 10 advertising. Furthermore, Woodward, McDowell and Larson conceived, wrote, cast, directed and edited the No on 10 spots without any input from any Excess Board Members (including the two "Board Members" whom Dobbs and Nielsen mentioned in its October 27th conversation with an FCC staff attorneys). Moreover, no Excess Board Members made changes to advertising copy of the spots.

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[104] J.A. 56.

The most noteworthy aspect of the No on 10 submissions to the FCC is the glaring omission of even one citation of a specific example of the exercise of advertising editorial control by any Excess Board Member. For example, the Declaration of Richard Woodward discusses the process by which No on 10 spots were created, but is silent as to any actual input or control by Excess Board Members. Mr. Woodward does state in his Declaration, however, that "Robert Nelson was on site most of the time during casting, shooting and postproduction of this advertising."[105]

Robert Nelson is the campaign manager who was retained and paid by the Tobacco Industry to oppose Proposition 10. Although, as Ms. Padberg's Declaration indicates, he recruited the Board members of Excess, he himself was not a director of Excess. The mere presence of Robert Nelson during the spot filming process is no indication that Excess was independent of the Tobacco Industry. Even a representation

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[105] See Declaration of Richard Woodward, J.A. 17.

that Robert Nelson was more than just present (i.e. an allegation that he participated in advertising decisions) would be irrelevant to the question of editorial control by the Tobacco Industry since Robert Nelson was an agent of the Tobacco Industry.

APPENDIX D

Letters from Yes on 10 to Stations

(1) Letter dated September 26, 1980 from Yes on 10 counsel to stations

(2) Letter dated October 3, 1980 from Yes on 10 counsel to stations

APPENDIX D

Law Offices
Richard J. Kalish
Bank of America Center
555 California Street
San Francisco, California 94104

September 26, 1980

Dear General Manager:

I represent Californians for Smoking and No Smoking Sections ("Yes on 10"), the nonprofit group that is sponsoring the initiative measure which will be Proposition 10 on the statewide November 4 ballot. This is to notify you of certain facts pertaining to commercial messages that have been or may be placed with your station by Californians Against Regulatory Excess ("Excess"), the group which is representing the Tobacco Industry in its opposition to the passage of Proposition 10.

It has come to the attention of Yes on 10 that Excess is making buys of television and radio time costing far beyond its resources

as reported in Excess' most recent campaign disclosure statement filed with the California Fair Political Practices Commission. During the 1978 campaign on a similar ballot measure (Proposition 5), fully 99.9% of the $6½ million spent against Proposition 5 came from one source: the Tobacco Industry. Based on the activities of Excess in this campaign, it is apparent that the money used by Excess to purchase the messages on your station comes virtually exclusively from the Tobacco Industry.

A series of Federal Communications Commission and Federal Court decisions clearly establishes your responsibility as a broadcast station to use reasonable diligence to discover the persons or entities who are acutally paying for paid political messages run by your station and to adequately disclose to the public in each such message the identities of such persons or entities. In fact, the FCC Identification Rule (set forth at 45 CFR 72.1212) actually goes even further, requiring:

> "Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence...could be known by the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent."

Accordingly, as in 1978, whenever the local campaign committee acts merely as a conduit for the funds of the Tobacco Industry for purchasing air time, you are obligated both to discover and to disclose the fact of the Tobacco Industry's sponsorship of the advertising so the public can know "by whom it is being persuaded." In re KOOL - TV, 26 FCC 2d 42 (1970).

You are obligated to make reasonable efforts to go beyond the apparent sponsor of the political message and to determine the true source of such advertising funds. See United States v. WHAS - TV, 385 F. 2d 784, 788 (6th Cir. 1967), and the resulting amended FCC administrative regulation at 45 CFR 73.1212, which the FCC has explained as follows:

> "To clear up any misunderstanding about whether the statute and rules require a licensee, who knows, or has reason to know the facts, to adequately identify the person or persons paying for...the material broadcast...Where a political broadcast is presented...by a committee which is really a compaign instrumentality for a candidate or a political organization, the public should be made plainly aware of the latter fact."

Furthermore, in view of the fact that the money supplied to Excess by the Tobacco Industry comes almost in its entirety from sources outside of California, it would be affirmative deception to attach a tag-line to such Tobacco Industry broadcasts identifying the sponsor as a California entity.

Yes on 10 hopes and expects that you will perform your obligations as set forth in these regulations in the event that you choose to accept any of the political messages purchased by the Tobacco Industry through its agent, Excess. Yes on 10 is prepared to file complaints with the FCC and to take whatever other remedial action may be available if these regulations are not followed.

In addition, if has come to the attention of Yes on 10 that the magnitude of the commercial time purchases already made or about to be made by the Tobacco Industry through its agent, Excess, is presently far beyond the financial capacity of Yes on 10 to match. Although Yes on 10 fundraising is proceeding with the goal of being able to purchase some amount of air time in the final two weeks of the campaign, please take notice that Yes on 10 requests under the Fairness Doctrine (as enunciated in Cullman Broadcasting, 40 FCC 576 and Public Media Center, 72 FCC 2d 776) that your station provide Yes on 10 time for messages without charge and in a time period of comparable audience exposure to the paid messages purchased by the Tobacco Industry through its agent, Excess. Yes on 10 expects the ratio of free messages to paid messages to be no poorer than 1:2. Yes on 10 further requests that you notify it immediately should you choose to sell any time to the

Tobacco Industry through it agent, Excess, so that Yes on 10 may make prompt arrangements for the Fairness Doctrine time due it.

A form is enclosed for your convenience.

Telephone responses may be made to:

Celia Du Bose
2054 University Avenue
Suite 600
Berkeley, CA 94704
(415) 841-3032

Very Truly yours,

Richard J. Kalish

cc: Paul Loveday, Esq.
Charles Firestone, Esq.
Daniel Lowenstein, Esq.
Susan Jacoby, Esq., Center for Law and the Public Interest
Geoffrey Cowan, Esq., Center for Law and the Public Interest
Peter Hanauer, Esq.
Robert de Vries, Esq.
Michael Asimow, Esq.
Andrew Schwartzman, Esq., Media Access Project

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APPENDIX D

Law Offices
Richard J. Kalish
Bank of America Center
555 California Street
San Francisco, California 94104

October 3, 1980

Re: Sponsorship Identification

Dear General Manager:

In my September 26, 1980 letter to you on behalf of Californians for Smoking and No Smoking Sections ("Yes on 10"), I notified you of evidence that Californians Against Regulatory Excess ("Excess") has been acting as an agent of the Tobacco Industry in purchasing air time from your station for advertisements urging a "no" vote on Proposition 10. I also notified you of your duty under the FCC Sponsorship Identification Rules both to use reasonable diligence to discover the persons or entities who are actually paying for paid messages run by your station and to announce before or immediately after the broadcast of each such advertisement that such advertisement was "paid for by the tobacco industry".

The following facts, which are critical to your fulfilling your due diligence and other obligations under the FCC Sponsorship Identification Rules, leave no doubt that Excess is merely acting as a conduit for the funds of the Tobacco Industry for purchasing air time against Proposition 10:

1. During the 1978 campaign on a similar California ballot measure (Proposition 5), fully 99.4% of the $6½ million spent against proposition 5 came from one source: the Tobacco Industry.

2. After that election, research by Mervin Field, who conducts the highly respected California Poll, was published concluding that:

> "...with Proposition 5, the fact that the tobacco industry was spending as much as it was to defeat it, became an issue. There was sort of a counter trend in the closing days of the campaign. If the tobacco industry had spent a couple million more dollars, it might have lost the election.."

3. In the Proposition 10 campaign now in progress, the Tobacco Industry has implemented a calculated policy to deceive as many California voters as possible as to the very fact of the Tobacco Industry's involvement in the no on 10 campaign and as to the amounts spent by the Tobacco Industry against Proposition 10 by:

(a) utilizing a front organization with the name Californians Against Regulatory Excess:

(b) causing a professionally managed campaign operating under the name Californians Against Regulatory Excess to make numerous public and private statements either to the effect that the Tobacco Industry would not be involved in the Proposition 10 campaign or that it was uncertain whether the Tobacco Industry would be involved and that if the Tobacco Industry were not involved, Californians Against Regulatory Excess could run a viable campaign without tobacco money;

(c) causing Woodward, McDowell and Larson (the advertising firm which wrote and produced the advertisements against proposition 5) to write and produce advertisements against Proposition 10 containing a sponsorship identification statement ("tag-line") of "Paid for by Californians Aginst Regulatory Excess";

(d) refraining from spending any money on advertising against Proposition 10 until September 24, 1980, the day after the cut-off date for disclosing campaign expenditures to the California Fair Political Practices Commission ("FPPC"). Under California law, all moneys spent by the Tobacco Industry through its agent Excess after September 23, 1980 need not be disclosed to the FPPC until 10 days before the election; and

(e) transferring very large amounts to Excess promptly after September 23, 1980 and causing Excess to buy very large amounts of advertising air time promptly after September 23, 1980.

4. The campaign spending disclosure statement filed by Excess with the FPPC for the period ending September 23, 1980 disclosed that 98% of the money transferred to Excess ($378,262 of a total of $389,099) came directly from the Tobacco Industry.

5. The campaign spending disclosure statement (together with copies of Excess mailings in the hands of Yes on 10) reveal that the small sums given to Excess from non-tobacco sources resulted from a mailing financed by the Tobacco Industry. The mailing requested each recipient to make a contribution of only $3.00 to Excess. Direct mail fundraising experts have advised Yes on 10 that given the economics of direct mail, such a mailing would have resulted in a net loss and that the sole purpose of such a mailing could only be for the political purpose of enabling Excess to claim that it has received numerous small contributions.

6. In the the days since September 23, 1980 the Tobacco Industry through its agent Excess has already purchased air time costing approximately one million dollars. Yes on 10 is convinced that the exercise of reasonable diligence by your station would determine that all of such air time has been paid for by the Tobacco Industry. Yes on 10 is convinced that the exercise of reasonable diligence by your station would determine that, as of today, 99.2% of the moneys transferred to Excess have one source: the Tobacco Industry.

7. All but $3,000 of the money supplied to Excess by the Tobacco Industry comes from sources outside of California.

In light of such facts and in light of your duties set forth in the FCC Sponsorship

Identification Rules, the cases and authorities interpreting those Rules cited in my September 26, 1980 letter, and in the Federal Register, Vol. 40, No. 82 at 18395, your station's concurrence in broadcasting No on 10 advertisements with a tag-line of "Paid for by Californians Against Regulatory Excess: would be participation in an act of affirmative deception.

Yes on 10 hereby requests, to the extent your station accepts any of the messages purchased by the Tobacco Industry through its agent Excess, that your station require the tag-line of "Paid for by the Tobacco Industry" on all such messages.

Please give this matter your immediate attention. We intend to file a complaint with the FCC and to pursue whatever legal remedies that are available with respect to broadcast stations which continue to run the deceptive and improper tag-line after Wednesday, October 8, 1980.

Very truly yours,

Richard J. Kalish

cc: Paul Loveday, Esq.
Charles Firestone, Esq.
Daniel Lowenstein, Esq.
Susan Jacoby, Esq., Center for Law and the Public Interest
Geoffrey Cowan, Esq., Center for Law and the Public Interest
Peter Hanauer, Esq.
Robert de Vries, Esq.
Michael Asimow, Wsq.
Andrew Schwartzman, Esq., Media Access Project

APPENDIX E

Letters from No on 10 to stations

(1) Letter dated October 2, 1980 from No on 10 Chairman to stations

(2) Letter dated October 13, 1980 from No on 10 counsel to CBS, Inc.

APPENDIX E

CARE
Californians Against Regulatory Excess
1633 E. Fourth St., Suite 286
Santa Ana, CA 92701

October 2, 1980

Dear Station Manager & Legal Counsel:

I am the Chairman of the Board and President of Californians Against Regulatory Excess, the California non-profit corporation and political committee organized to educate Californians about excess government regulation and specifically to oppose Proposition 10 on the Novermber 4, 1980 ballot, which purpose has been registered with the California Secretary of State as required by law.

Legal counsel to our Committee has informed me that a number of stations have received a letter from Richard J. Kalish, a San Francisco attorney, arguing that radio and television advertising by our Committee is, in fact, advertising by tobacco companies and should be so identified.

The legal response to Mr. Kalish's arguments is attached. Demonstrated here, it seems clear to me that the proper identification of our radio and television spots is "Paid for by Californias Against Regulatory Excess" because our Committee, and only our Committee is, in fact, the sponsor.

Our Committee is not a front for any person, company or industry. This letter, therefore, summarizes facts about our Committee so that our advertising can be aired as we have produced it.

Early in the summer of this year, Bob Nelson, President of Robert Nelson & Associates, an eminently qualified political campaign firm, Bill Dohr, Secretary of the Republican party, and I met to discuss what type of broad coalition could be organized to oppose Proposition 10 and what funding could be obtained. We learned early on that some tobacco companies would probably contribute some amount for seed money but that they were not planning to participate to the

extent of 1978 and that they wanted to see whether there was sufficient opposition in California. We did receive some early contributions to allow us to contact other for support.

The three of us worked on forming a Board of Directors that represented the industries most affected by Proposition 10 and those leading citizens whose presence would indicate the breadth of opposition which we planned to mobilize. The Presidents of the California Real Estate Association, California Hotel & Motel Association, California Restaurant Association, and California Tobacco & Candy distributors Association became Board members, as did the State Director of the National Organization of Women, the former Republican State Controller, a Democratic California Assemblyman, the Assistant Director of Patient Services, University of California at Irvine, a Past President of the American Lung Association of Los Angeles County and the President of the Peace Officers Research Association of California. This

Board meets regularly to discuss campaign activities, and Bill Dohr and myself, as the senior Officers, provide direction to Bob Nelson and the staff of Californians Against Regulatory Excess. None of these Board members receives any compensation for this service. I have never had any contact with any representatives of the tobacco companies and am opposing Proposition 10 because of my strong personal motivation to oppose excess goverment regulation.

To my knowledge, no Board member is paid anything by any tobacco company.

The Committee is properly organized as a non-profit corporation, we have received tax exempt status from the IRS and California Franchise Board, and we follow all the formal and prudent operating procedures required of California corporations.

We have retained staff and consultants to draft advertising copy, but our Committee employs legal counsel to review every word

and fact to ensure its accuracy. We have not delegated editorial control to anyone, certainly not to any contributor.

We are soliciting support and contributions primarily by mail and so far we have received responses from 4,387 Californians and contributions from 1,607. And recently we again solicited a number of tobacco companies.

A consequence apparently not anticipated by the tobacco industry was that their decision not to form their own committee was interpreted to mean that Proposition 10 was acceptable legislation. This made our organizing efforts much more difficult, and Bob Nelson informed these companies of these facts and the fact that the misleading information published by the proponents of Proposition 10 was not being countered adequately.

Within the last month, a number of tobacco companies have contributed to our Committee and pledged their support to defeat this vague and misleading initiative. They

join the California Chamber of Commerce, the California Manufacturers Association, the Peace Officers Research Association, the National Federation of Independent Business, the Libertarian Party, of which I am the National Chairman, and the California Republican Party in opposing Proposition 10.

The Officers of Californians Against Regulatory Excess have discussed the request by Mr. Kalish. We conclude that being forced to identify our campaign advertising as a product of "The Tobacco Industry" would be inaccurate and in dereliction of our duty to our Board. Our organization plans to receive contributions from thousands of Californians and support from millions of voters and assistance from major organizations and associations throughout the state. To identify these people as a "front" for the tobacco industry is neither correct nor proper.

If you have any further questions, please do not hesitate to contact any one of the Californians Against Regulatory Excess offices, and I will try to respond as quickly as possible.

Very truly yours,

David P. Bergland
Chairman & President

DPB:ns

cc: Member of the Board
Californians Against REgulatory Excess

APPENDIX E

DOBBS & NIELSEN
Attorneys and Counselors at Law
SUITE 2500, THE ALCOA BUILDING
ONE MARITIME PLAZA
SAN FRANCISCO, CA 94111

Telephone (415) 362-1940

October 13, 1980

Rosalyn Brassell, Esq.
Assistant General Counsel
CBS, Inc.
7800 Beverly Blvd.
Los Angeles, CA 90036

RE: No on Proposition 10 spots

Dear Ms. Brassell:

You have asked this office to provide additional information in response to a letter received from Richard J. Kalish, attorney for the Yes on 10 campaign, dated October 3, 1980 entitled "Sponsorship Identification".

Mr. Kalish's letter alleges that our client, Californians Against Regulatory Excess (hereinafter "Committee") is acting as an agent of the "Tobacco Industry". He states this fact in every other sentence, apparently on the

behalf that if he says it often enough, the repetition of the accusation will make it fact.

Based on all the information provided me by the Committee, we see no way that such agency can be established.

The leadership and direction for the Committee vests in its Board of Directors, whose names and titles are set forth on the enclosed brochure. This board meets weekly, makes decisions and supervises the campaign management firm, Robert Nelson and Associates, Inc., which has been retained by the Committee to educate the voters on Proposition 10.

We cannot comment specifically on the alleged motivation and policy of the "Tobacco Industry" as stated in Mr. Kalish's letter since we have no knowledge. However, it is true that once it became evident that the stand-offish position adopted by the tobacco companies was being interpreted as acceptance of the restrictions imposed in Proposition 10, the Committee personnel were successful in soliciting contributions from various tobacco

companies. In fact, a number of tobacco company representatives have quizzed our chairman extensively on the campaign being conducted by the Committee prior to making decisions on certain levels of support.

It should also be remembered that the Committee has just begun to solicit throughout California, and within the last weeks it has sent out over 25,000 contribution letters to organizations other than those already supporting the No on Proposition 10 campaign. All contributions received will be reported on the next campaign statement.

The contribution pages of the Committee's campaign report filed on September 29, 1980, disclosing all transactions through September 23, 1980, are attached for your scrutiny.

As discussed in the legal memorandum prepared by this office, which accompanied Mr. Bergland's letter to all stations in response to Mr. Kalish's original letter, the most recent and only FCC decision directly on point is the V.O.T.E.R. case which explained that the

controlling factor is separateness of entities and not source of funding. The Committee's Board in its most recent meetings has re-affirmed that it will not identify its spots as being the spots of another entity or industry, because this would not be truthful.

It is obvious that Mr. Kalish is writing this second letter to all stations in preparation for filing a general complaint with the FCC against all California media, as indicated by his intimidating inclusion of nine attorneys as recipients of copies of his letter to stations. Unfortunately, it has become common place these days for such diversionary tactics. As the old law school saying goes: "When you have the facts, pound on the facts, when you have a law, pound on the law, when you have neither, pound on the table", or in this case, file a complaint with the FCC.

If you wish any further information please do not hesitate to contact me, contact any of the officers or Board members of Californians Against Regulatory Excess, or contact Robert

Nelson or Eileen Padberg at the Californians Against Regulatory Excess headquarters (see brochure).

Very truly yours,

Vigo G. Nielsen, Jr.
Corporate Counsel
Californians Against
Regulatory Excess

VGN:sg: Encls.
cc: David Bergland
William Dohr
Robert Nelson
Louise Olsen, Western International (w/o encls.)

bc: Mary Woodward
Chuck Bell

APPENDIX F

Declaration of Patricia Leddy, former media consultant to the Tobacco Institute, showing that the Tobacco Institute had editorial control over No on 10 advertisements

APPENDIX F

DECLARATION OF PATRICIA LEDDY

I, Patricia Leddy, declare:

1. I am the owner of Leddy Film Productions and in that capacity I am engaged in the business of public relations, advertising and film making. I reside in Bakersfield, Kern County, California and have offices in Bakersfield and Santa Barbara, California. The facts contained in this Declaration are in my own personal knowledge and, if called upon, I could testify competently thereto.

2. In August of 1982 I was contacted by Stan Harper of Harper Associates, a public relations firm in Bakersfield, with respect to the production of television and radio advertisements against Measure A on the November 2, 1982 Kern County ballot. Measure A concerns the establishment of smoking and no smoking sections in indoor public places and places of employment in Kern County.

3. Mr. Harper informed me that his firm had been retained by Stu Spencer of the

political consulting firm Spencer-Roberts in Orange County, California.

4. I was initially told by Mr. Harper that I would have a $20,000 budget with which to work. Based on that budget and believing that I would be primarily responsible for preparing and implementing campaign advertising in the media, I prepared a written proposal for an advertising campaign which I presented to Mr. Harper. I did not receive any formal response to my proposal, and my proposal has not been implemented by the campaign which opposes Proposition A.

5. After being contacted by Mr. Harper to work on behalf of the "No on A" campaign, I was asked to and did attend a No on A strategy session on Wednesday, September 22, 1982 at 11:30 A.M. at the Hyatt Regency Hotel in Los Angeles, California. Prior to the meeting I received via the mail the agenda attached hereto as Exhibit A. Present at the September 22 meeting, in addition to myself, were Tim Grush from Spencer-Roberts, Stan Harper, Chuck Rund of the Houston public opinion polling firm

of V. Lance Tarrance & Associates, Hal Larson, a political consultant from San Francisco, an assistant to Hal Larson who was called "Martha", two attorneys from the law firm of Dobbs & Nielsen and Stu Spencer, who arrived late but chaired the meeting and dominated the discussion.

6. Because Stu Spencer had not yet arrived, Chuck Rund spoke first. Mr. Rund distributed to each person at the meeting a copy of the public opinion poll which is attached hereto as Exhibit B. He said that his firm had conducted the poll in Kern County in connection with the November election campaign. Mr. Rund then summarized the polling data and the conclusions his firm had drawn from that data. He explained, among other things, that the polling data indicated that public awareness of the Tobacco Industry's association with the No on A compaign would drive a substantial number of voters into the "yes" column.

7. By the time Tim Grush had finished speaking, Stu Spencer had arrived and took control of the meeting. Mr. Spencer complained that it was very difficult to work with Tobacco Industry executives on campaigns against smoking and no smoking section initiatives. He complained that Tobacco Industry executives demanded control over campaign media advertising decisions and would not allow important actions relating to media advertising to be taken without their explicit prior approval. At one point in the meeting Mr. Spencer said, to the best of my recollection, the following to me:

> "We've got to get these Tobacco Industry executives off our backs during this campaign. You have no idea how difficult it is to please them."

8. Stu Spencer told the meeting that scripts for television and radio advertisements to be used in the No on A campaign should be modeled on the television and radio spots used in the 1980 Proposition 10 campaign. He further stated (i) that the Tobacco Institute

executives are accustomed to working with Hal Larson, (ii) that they like him and have had success in using his work against other smoking and no smoking sections campaigns, (iii) that it would be easier to get Tobacco Industry approval for use of new spots in the No on A campaign if they are similar to the advertisements which had been written by Hal Larson and which had already been approved by Tobacco Institute executives for use in the Proposition 10 campaign, and (iv) that it would expedite obtaining the Tobacco Institute's approval if the script bore Hal Larson's name. Mr. Spencer also stated that he believed he would be able to obtain decisions from the Tobacco Institute regarding media advertising scripts in this campaign faster in this campaign than in past campaigns because his contract with the Tobacco Institute for this campaign specified that the Tobacco Institute must approve or disapprove scripts within 72 hours after receipt by the Tobacco Institute.

9. During the meeting we listened to and watched radio and television advertisements which had been used against Proposition 10 on the 1980 Statewide ballots. Thereafter, I protested to Chuck Rund that a campaign based on those scripts would not be successful in Kern County. I expressed my belief that the scripts were an insult to the intelligence of Bakersfield citizens who are more sophisticated than Hal Larson apparently believed and who do not like carpetbaggers.

10. Nevertheless, it was agreed at the meeting that Mr. Larson and I would write new scripts which would be completed and approved by Stu Spencer by Monday, September 27, 1982, that Stu Spencer would immediately have the scripts delivered to the Tobacco Institute in Washington, D.C., and that I would begin producing the advertisements immediately after the scripts had been approved by the Tobacco Institute. It was expected that such approvals would be obtained, if at all, by Thursday, September 30, 1982.

11. I was told that after the scripts were approved by the Tobacco Institute, I was to work the entire following weekend if necessary to produce the advertisements. When I suggested that it would be very expensive to do production work during the weekend because I would have to pay overtime to many people, I was told by one of the attorneys of Dobbs & Nielsen to pay the overtime. I was repeatedly told that the Tobacco Industry has plenty of money and that expense was not a consideration in the work I was being asked to do. When I repeated that what I was aksed to do was very expensive, and again asked what my budget was, I was told that $100,000 had been budgeted by the Tobacco Institute.

12. Prior to the meeting, Stan Harper had told me that it was necessary for the No on A campaign to raise $1,000 from Kern County citizens in order for No on A to appear to be a legitimate local campaign. During the September 22 meeting, however, when this subject was raised, Stu Spencer advised us not

to be concerned about actually raising such funds locally because, if necessary, he would get that amount from some other source.

13. On September 24, 1982 I spoke on the telephone with Tim Grush of Spencer-Roberts, who told me that I was being dropped from the No on A campaign. He said that I should not take my dismissal personally. "It's like the Mafia," he said. "It's strictly business."

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on October 30, 1982 at Bakerfield, California.

Patricia Leddy

An executed copy of Patricia Leddy's Declaration has been lodged with the Clerk of this Court.